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LEGAL PROBLEMS IN THE ADMINISTRATION OF EDUCATION BY
EDUCATIONAL AND NONEDUCATIONAL GOVERNMENT AGENCIES.

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THE INTERGOVERNMENTAL CONTROLS THROUGH WHICH PUBLIC
EDUCATION IS ADMINISTERED IN THE UNITED STATES WERE ANALYZED
DURING THE STUDY. THIS WAS ACCOMPLISHED BY APPLYING THE
PROCEDURES OF LEGAL RESEARCH TO AN EXAMINATION OF THE
PROVISIONS GOVERNING EDUCATION AS FOUND IN THE STATUTES,
COURT DECISIONS, RULINGS AND REGULATIONS OF GOVERNMENTAL
AGENCIES, AND RELATED MATERIALS. THE RESULTS OF THE STUDY ARE
PRESENTED UNDER FOUR GENERAL HEADINGS--(1) THE LEGAL
ORGANIZATION OF THE AMERICAN SCHOOL SYSTEM, (2) THE FINANCIAL
ADMINISTRATION OF SCHOOLS, (3) THE ADMINISTRATION OF THE
SCHOOL PLANT, AND (4) INTERGOVERNMENTAL ADMINISTRATION OF
SCHOOLS BY SPECIAL AGENCIES. MAJOR CONCLUSIONS OF THIS STUDY
INCLUDE--(1) THE FUNCTIONS OF GOVERNMENT ARE SOMETIMES
PERFORMED THROUGH THE ACTIVITIES OF TWO OR MORE AGENCIES, (2)
PROVISIONS FOR THE INTERGOVERNMENTAL CONTROL OF EDUCATION
HAVE HAD VARIABLE EFFECTIVENESS UNDER DIFFERING SOCIAL
CONDITIONS, (3) THE GROWING BODY OF LEGISLATIVE ENACTMENTS
INDICATES A TREND FROM THE TRADITIONAL DEPENDENCE UPON LOCAL
GOVERNMENT TOWARD THE CENTRALIZATION OF CERTAIN ASPECTS OF
EDUCATIONAL GOVERNMENT, AND (4) THE EVIDENCE EXAMINED IN THE
PRESENT STUDY INDICATES THAT THERE MAY BE MORE RATHER THAN
LESS INTERGOVERNMENTAL CONTROL OF PUBLIC EDUCATION WITH THE
PASSAGE OF TIME. (WB)

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LEGAL PROBLEMS IN THE ADMINISTRATION OF EDUCATION
BY EDUCATIONAL AND NON-^{one word}EDUCATIONAL
GOVERNMENT AGENCIES

Cooperative Research Project No. 1359

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Tucson, Arizona

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CHAPTER I

THE INTERGOVERNMENTAL CONTROL OF PUBLIC EDUCATION

The task of the present study is to analyze the intergovernmental controls through which public education is administered in the United States.

No single agency of government has either the authority or the responsibility to administer all of the aspects of the American educational enterprise. Primary governmental responsibility for the provision of a public school system is lodged in each of the fifty states in the state governments. In forty-nine of them (all except Hawaii) a major portion of responsibility for the actual conduct of schools is delegated to local school districts.

This statement of responsibility scarcely hints at the complex provisions which exist in the legal descriptions of the machinery through which the public schools are administered. The administration of education at the state level is not confined to state departments of education. Nor, at the local level, is it confined to the activities of school districts and their officers. Rather, administrative powers are diffused through various departments of government.

It is true that major responsibilities for such matters as instruction and pupil services are normally delegated at the state level to state boards of education and state education agencies, and at the local level to school boards. But other specific school activities are subject to control by various governmental agencies. Local police customarily have primary responsibility for the control of traffic and the management of crowds at school events. Health agencies may provide school nursing service, health examinations, and similar services. Other county or municipal agencies may perform a variety of public services for people and institutions in local communities--including schools.

In addition to primary responsibilities such as these, the laws in individual states confer power upon various non-educational agencies of government to review or restrain the actions of local school authorities. Thus, budgets, tax levies, and other fiscal matters may be subject to approval by city councils, county boards, or individual public officials. Local zoning regulations, building codes, and similar regulations dealing with school buildings are binding upon districts in various degrees. All these are matters of public knowledge. They are often used to give vigorous support to the public schools. But the extent of the diffusion of power to control schools is not always recognized, nor is its basis fully understood.

Two fundamental questions are involved in the analysis of power to control education. The first relates to the substantive provisions of law for dealing with these various aspects of school activity. This has importance to all governmental units having responsibility toward education in order to enable them to comply with existing legal stipulations, to develop regulations and procedures for administering their own responsibilities, and to coordinate their own activities with those of other agencies.

The second deals with the overall governmental structure for carrying out the educational purposes of the state. This may be stated in the form of a question: What ought to be the governmental structure provided in order that there be economical and effective administration of the public school enterprise? The continuously changing conditions of society require modifications in the legal provisions under which society is governed. Eventually these modifications in the structural organization of government generally extend also to school government.

Statement of the Problem

The fundamental intent of the present study is to examine the materials bearing on both of these issues. That is, (1) to review the substantive provisions for the administration of those aspects of the educational system in which both civil and educational agencies have important responsibilities; and (2) to view these in relation to the whole governmental structure provided for the administration of public education.

It is assumed that the effective administration of the public school systems in this country is facilitated by both knowledge and understanding of the legal structure provided for it. It is hypothesized that knowledge regarding the intergovernmental relations which exist in the control of public education is incomplete, and that an understanding of it may be broadened as the subject matter in question is collected, analyzed, and integrated into the presently existing body.

The American educational system is based upon a common understanding that great importance attaches to an educated citizenry. This importance is conceived to be so great that neither the quantity nor quality of education can be left to the caprice of individual families. Universal education can be provided effectively only by a social institution whose activities are pervasive throughout society. In this country, that institution is government.

Yet there is no universal agreement as to the character of the education which should be provided or as to the agencies which ought to be established to carry out the educational purpose. If government is to be representative of all the people, it must, in its educational functions, provide definite services for all persons upon whom its educational program operates. And it must, on the other hand, accept limitations both as to function and as to method of conducting its educational activities. Its activities must be limited by the conflicting demands for certain kinds of educational service made by members of the society which does the educating, and the activities must be limited by public agreement with respect to the expenditure of public funds. The nature and extent of the education to be provided is determined by the expectations of society at large.

Thus, while there is compulsory education, there are also limits beyond which compulsory education requirements do not go. A child does not spend all of his time in school. He is protected from too great demands upon his time for education in order that he may participate in the activities of family living, recreation, and citizenship.

Similarly, the school must be operated so that it does not impose health, safety, or financial hazards to people not enrolled in school or to other societal or governmental institutions. In one sense, education and

educational agencies must compete with other public services. Thus, in the present investigation, there is evidence of a legislative balancing of the demands for education against safety, health, recreation, and other similar public concerns.

The Antecedent Investigations

The problem of the intergovernmental control of education is not new and it has not been newly recognized. It has not, however, been examined in all of its major contexts by writers in the field of public education. Individual problems have been identified and attacked in single investigations. A half a dozen or more of these ought to be cited in relation to the present investigation since they report studies of some aspect of the total problem in considerable detail or because they provide a background for the consideration of the data produced in the present study.

The problem of the fiscal relationships between school boards and city governments was examined by George Frasier in his book The Control of City School Finances¹ in 1922. Frasier attempted to determine by questionnaire whether local school district officials were dependent upon city governmental agencies for income, budgetary approval, and related fiscal matters. Legal provisions were also reviewed. Frasier then attempted to establish criteria by which to evaluate the relative effectiveness of fiscally independent versus fiscally dependent school districts. The general verdict was in favor of the fiscally independent districts.

Edward C. Bohlmeier reported on the legal basis of city and school relationships in 1936.² He studied the relationships between school authorities and municipal governments in 191 cities then having a population of 50,000 or more--many of which operated under charter or special legislation. The report covered both legal provisions and actual practice in these cities.

¹George W. Frasier, The Control of City School Finances, Milwaukee, Wisconsin: Bruce Publishing Company, 1922.

²Edward Claude Bohlmeier, Legal Basis of City and School Relationships (Unpublished Doctor of Philosophy Dissertation, University of Chicago, Chicago, Illinois, 1936).

The comprehensive character of Bohlmeier's study makes it extremely valuable for purposes of comparison with both earlier and later studies.

Some variations in findings reported by these different studies are no doubt the result of studying different populations or using different kinds of evidence. But after recognizing these, the Bohlmeier study has an additional value as a bench-mark from which to observe the instability of school-municipal relations.

Subsequently, Nelson B. Henry and Jerome G. Kerwin analyzed certain aspects of school-municipal relationships in Schools and City Government in 1938.³ This study was based in part upon the materials in Bohlmeier's report. The authors chose to emphasize the "service" rather than the "control" features of the intergovernmental relationships. They gave extended consideration to fiscal problems. In general the authors favored the operation of schools by city governments.

The National Education Association (Research Division) published Fiscal Authority of City School Boards in 1950.⁴ This bulletin was based on questionnaire returns from 1892 school districts in cities of more than 2,500 population. The study identified much the same pattern of school-municipal relations reported earlier by Bohlmeier, but indicated some change from the prevailing practices indicated for large cities in the earlier study.

More recently George S. Reutter, Jr. completed a study of fiscal independence among major school districts.⁵ This study was also done by questionnaire. It indicated that a considerable number of the larger school systems of the United States still operate under codes providing some degree of fiscal dependence.

³Nelson B. Henry and Jerome G. Kerwin, Schools and City Government, Chicago: University of Chicago Press, 1938.

⁴National Education Association (Research Division), Fiscal Authority of School Boards, National Education Association Research Bulletin, Washington, D. C.: The Association, April, 1950.

⁵George S. Reutter, Jr., Fiscal Independence Versus Fiscal Dependence of School Boards, Chicago: American Federation of Teachers, AFL-CIO, 1960.

Another presentation, The Public School and Other Community Services, edited by Theodore Reller, appeared in 1955.⁶ This was a symposium of comment on services provided in communities by the public schools in relation to other community activities. This discussion, however, did not give consideration to the legal provisions for administering these programs.

A recent series of studies was completed at the Maxwell Graduate School of Business at Syracuse University under the chairmanship of Stephen K. Bailey.⁷ These are descriptive studies and report individual investigations and observations of various aspects of school government in New England and the north Atlantic states. These reports were not concerned with analysis of legal provisions for the social patterns which they described. Some of the findings are related to the materials of the present study. At times, they supplement and support the findings of the present study, but at other times, they indicate important variations. These reflect the variety of sources used and the fact that the expectations of society are enforced through various means beside legal provisions.

More recently, a series of reports has been made by the Advisory Commission on Intergovernmental Relations.⁸ These reports deal with the growing problems of government in metropolitan areas. While they are primarily concerned with the problems of political government and the activities of civil agencies of government, they do give some attention to school problems. Much of the factual information presented in these reports has reference also to the issues of intergovernmental control of education.

⁶Theodore L. Reller, (Ed.), The Public School and Other Community Services, Philadelphia: The American Academy of Political and Social Sciences, 1955.

⁷Stephen K. Bailey, Chairman, The Economics and Politics of Public Education, Syracuse, New York: Syracuse University Press, 1962. (Twelve individual reports).

⁸Advisory Commission on Intergovernmental Relations, Commission Reports, Washington, D. C.: Government Printing Office, 1961 ff. (A series of individual reports. See also cited references from the series.)

The Scope of the Present Study

The present study was designed to re-examine and extend the conclusions presented in earlier reports. Fiscal matters, while of major importance, constitute only one of the areas within which intergovernmental controls are applied to the administration of education. The construction and operation of school buildings, the administration of personnel, and even a few aspects of the curriculum are also subject at times to intergovernmental controls.

In the outline of the present study, it seemed logical to direct the inquiry toward state policy in the government of schools. The state is the primary repository for providing public education, and it is the first locus of decision on basic educational policy. Authority to govern and administer the schools is allocated for the states by the legislatures. The legislatures allocate certain powers to state agencies; others to local agencies. They grant authority to educational agencies to govern the schools, and they distribute other authority for the same purpose to non-educational agencies of government. Public policy as defined by the state is one common element found throughout all of the provisions for operating the public schools.

Recent historical trends in school operation have also tended to emphasize the importance of state policy. While there is some movement in both directions, the general trend over the past forty years since Frazier's report has been to decrease the number of fiscally dependent⁹ school districts. Similarly, the number of school districts operating under charter or other forms of special legislation has tended to decrease somewhat also. A third consideration is that state policy which was at one time much less well defined has been extended to cover the operations of both fiscally dependent and chartered school districts to a greater extent than appears to have been true at one time. Thus, state policy appeared to have greater significance as it tended to become the prevailing policy in school operation.

⁹"Dependent" school districts, as defined in previous studies, are those in which the school budget must be approved by some non-school agency. School districts adopt their own budgets in "independent" districts. This definition is under examination in the present study.

It is necessary to define the particular aspects of school operation which are to be included within the present study. A reasonable approach toward this question might be made by examining legal provisions under the general taxonomy provided for financial administration. This has certain initial advantages since money must be spent in carrying out many of the major aspects of the public school program.

However, where significant responsibility for school activities is reposed in some other governmental agency, the money cost of the operation may not appear in the financial reports for the school district. Thus, civil defense activities, for example, are not commonly conducted by schools and might not be identified as a problem area by reference to financial provisions. Identification of such additional areas must be made by reference to educational literature, records of litigation, or reports of various committees and commissions.

There have been at times complaints as to the awkward burdens imposed on school officials in carrying out their functions as a result of the dispersion of authority among a variety of governmental agencies. One such study was reported to the Legislature of New Mexico by a study council which had been authorized to review school legislation in that state.¹⁰ At one point, this advisory commission listed forty-one agencies which exercised some kind of control or restraint upon local school administration. Many of these are peculiar to the state of New Mexico and some of them lie outside the proper scope of the present study. But the list is indicative of the many areas in which there is some division of responsibility between educational and non-educational agencies for the execution of school policies. The list follows:

Attorney General	Local budget commissioners
Chief of public school finance	Local superintendent
City councils	Police courts
Commission on youth	Political parties
County clerks	Special interest groups

¹⁰Irvin P. Murphy, Analysis and Evaluation of the New Mexico School Code: A Report to the Legislature, 1961, p. 153.

County commissions	State auditor
County tax assessors	State board of education
County treasurers	State board of finance
Department of finance and administration	State department of personnel
Department of public health	State institutions
Department of public welfare	State investment officer
Director of school lunch	State land commissioner
District attorneys	State library commission
District court clerks	State purchasing agent
Election judges and clerks	State superintendent
The governor	State retirement board
Law-enforcement officers	State tax collecting agencies
Legislature	State tax commission
Library extension service	State transportation director
Local boards of education	State treasurer
	Surplus property agent ¹¹

Few sources contain as long a list as this one, but the total number of agencies is indeed very long. The major problem of analyzing the overall governmental structure to administer public education can be seen more clearly if attention is directed to a smaller number of them. Selection of topics was attempted on the basis of judgment as to the observed or estimated results of assignment of governmental powers to individual agencies to control education. Similarly, identification of the particular matters to be considered under each of these was based upon the same considerations. The factors used in considering the selection of these items included (1) their relationship to consistent patterns of governmental operation, (2) their practical operational effects, (3) their effects in provoking disputes, fomenting litigation, or producing other evidences of dislocation, (4) their apparent adaptability to emerging problems in the administration of the public school system where these can be recognized, (5) the apparent importance of the subject to a number of the states.

Investigative Procedures

The major effort in the investigation was in fact to analyze legal materials. Here, the procedure was to locate, collect, and later analyze and synthesize legal and other related data bearing on the problem through well

¹¹Ibid.

recognized legal and other related research methods. The materials analyzed included:

1. Applicable statutes in each of the fifty states.
2. Decisions of appellate courts.
3. Opinions of state attorneys general and other state departmental rulings.
4. Regulations from both educational and non-educational state agencies.
5. Legal treatises, commentary, and legal periodicals and similar materials.
6. Relevant and important materials from the literature of education, political science, public administration and related fields.

The interpretation of these materials must be undertaken cautiously with due consideration for the reliability of the legal provisions as a description of actual governmental structure or of the procedures of administering the educational enterprise. Laws are designed to establish norms for the behavior of people in a society. But, like many other norms, legal provisions do not always describe the actual behaviors. This is a well-known phenomenon and needs no elucidation. It must be recognized in the interpretation of legal materials.

Cross-Investigation

But in the study of the institutions of a society, it is often about as important to identify the circumstances under which the deviations occur and the extent to which they may be socially accepted, approved, or condoned as to know what the norms are themselves. Nonetheless, legal stipulations are among the reliable norms available to describe the expected behaviors in the administration of the school system. The significance of deviations can only be estimated unless some statement of norms can be identified. And while the legal stipulations may sometimes be ignored, violated, or honored in degree only, still, when disagreements develop, the legal provisions ordinarily prevail in a society which is organized on the basis of written legal codes.

In order to check the relationship between legal provisions and operating conditions and from this to arrive at as dependable an understanding as possible, two checks were undertaken in individual states. First, correspondence was directed to the state education agencies of the various states describing provisions of law of particular complexity or doubtful meaning in those states and asking for a verification or clarification from the agencies. As a further check, consultations and interviews were arranged with public officials, school administrators, and professors of school administration familiar with the situations in individual states to verify data or clarify understandings.

Interpretation of Data

When these procedures in the accumulation of data have been carried out, a great deal of interpretation is still necessary. It is essential that the information relating to non-educational agencies of government be considered in relation to the character of local school district organization.

The next major consideration appears to be a description of the alternatives available or at least developed in public policy dealing with particular subject matter. In most instances, reporting all of the variations of policy in each individual state would result in textual descriptions of such great variety that their meaningfulness might be open to question. This is especially true in instances where statutory or judicial utterances must be tempered by explanations or the inclusion of descriptive details.

Thus, the procedure adopted for this study has been, first, to identify the major alternatives of state policy in dealing with particular subject matter and to present them as such. Where two or more alternatives can be identified as prevailing and exceptional policies, these may be indicated. But in general, this kind of evaluation has been avoided. A single illustration used in only one state may have as great force in developing understanding of how particular problems are handled. In other circumstances, the same kind of item may have only trivial legal or operational effects.

Organization of the Report

The present report has been organized into eight chapters. The first (present) chapter is concerned with a statement of the problem and a discussion of the procedures used in collecting and analyzing the data.

Chapter II describes the general scheme of legal organization provided for the American school system. Little of this chapter is new. The chapter is intended to describe the legal structure briefly and to emphasize those aspects of the structural organization which have particular significance for analyzing the relationships between the educational agencies and various other agencies of government which have also been given responsibilities in relation to the public schools.

Thus, the chapter reviews the general position of the state as the major determinant of public school policy, the delegation of actual operation of schools to local school districts, the classification of districts and provisions for exceptional school units, and particularly the relationships between school district and other units of local government which at times exercise important duties in relation to the public schools.

Chapters III through VII report the substantive findings of the study. As the legal provisions for schools were analyzed, it appeared that public policy gave particular attention to fiscal matters. Some of these have been analyzed in a number of previous studies. Attention in the present study was directed particularly toward the accounting system (through which considerable control may possibly be exercised over school district policy), the adoption of a school budget and control of expenditures, and the management of the school debt.

In the presentation of the material in these two chapters (and in the three which follow) it is sometimes found helpful to include a general narrative of practice in carrying out a particular aspect of school operation. While the narrative material is generally known to students of school government, the intergovernmental control of education can be analyzed more effectively in comparison with more commonly used practices.

The whole matter of school plant construction, operation, and regulation were dealt with in Chapters V and VI. These grow in importance as the urbanization of the country progresses. Both private citizens and public agencies have a broad range of freedom in constructing buildings in relatively open country. But when sections are built up and people live closer together, some control of land use must be undertaken to protect the public interest. Thus, zoning regulations, building codes, and the supervision of actual construction and operation of buildings become matters of public concern. Chapters V and VI discuss the application of these governmental functions to school operation.

Chapter VII discusses the operation of a number of governmental agencies which are organized to supervise various aspects of community life; to employ the services of trained and experienced experts in dealing with these matters; and to provide uniform administration of the policies concerned throughout the various institutions and public segments of the community.

An attempt is made in Chapter VIII to relate the character of the governmental structure provided for the schools with the substantive materials discussed in Chapters III through VII. A concluding section in Chapter VIII presents certain observations regarding the data which flow from the overall analysis of the problem and were primarily the work of the director.

The chief problem in the study was to analyze the intergovernmental controls exercised upon public education and to relate them to the overall structure provided for the government of the public schools. These relationships are not always identified in the bit-by-bit accumulation of individual statutes and court decisions through which the governmental structure of public education is defined. Thus, a brief synthesis is presented in Chapter VIII relating these various items in a few patterns which, in present rapidly changing patterns of social organization, can readily be identified.

Summary

Summarizations regarding legal provisions for operating schools must be interpreted in recognition of the way law functions in society. One of the

chief functions of an organized society is to provide behavioral norms for its people. These are imposed through a variety of devices. Mores, customs, traditions, and the written literature of a people are among the means used to define and enforce them. Legislation--written laws--represents a highly developed means for the enforcement of social norms. As populations grow and the relationships between people become more complex, the necessity for written codifications of the expectations of a people becomes much greater.

But notwithstanding the development of legal codes and the related statements which interpret and enforce the expectations of society, all of the other means by which norms are established and enforced continue in effect. The mores still influence conduct in the same areas where laws also apply.

The mores, customs, and other social controls may reinforce legal codes or they may conflict with them. Where the expectations of society are codified in written language and officially adopted, they are expected to prevail. But they do not always do so. Other norm definitions may sometimes control. But in view of the relatively permanent and official character of legal codes, an understanding of societal arrangements is incomplete without considering the legal formulations.

Thus an analysis of the legal provisions operating in a society is a valuable resource in arriving at an understanding of that society. Still the legal codes and related materials do not precisely describe what happens in the society. Other devices of social control also continue to operate, and actual practices may at times vary considerably from the legal norms. These generalizations apply to the legal provisions for education. They apply particularly to complex intergovernmental relationships such as those through which public education is administered.

CHAPTER II

THE LEGAL ORGANIZATION OF PUBLIC EDUCATION

An understanding of how the government of the public school system is legally organized is basic to an understanding of how intergovernmental controls upon education operate. While the general outlines of the legal provisions for the governmental institutions controlling education are well-known, certain details regarding them are important enough to be repeated here to assure that a basis is laid for an understanding of legal issues which may be involved.

It is well-known that the fifty states have fifty different school systems. In general it may be stated that in each of the states there is: (1) an overall plan for the administration of the public school system; (2) a delegation of responsibility for the operation of most phases of the public school program to local school districts in all of the states except Hawaii; (3) some classification of local school districts for various purposes and in various ways in most but not all of the states; and (4) permissive or other special legislation in some of the states granting privileges to one or a few school districts or imposing special burdens upon them. There are also special arrangements between (1) school systems and (2) municipalities and special types of governmental districts.

All of these represent conditions of importance in the interpretation of relationships between agencies of educational government and agencies of general government where both have some responsibility for the administration of the public schools. Moreover, reference to statutes, regulatory codes, court decisions, or the interpretations of authoritative agencies are necessary to understand what these relationships are; the relationships are not always apparent from simple replies to questionnaires or even from narrative accounts of what happens in individual school districts.

State Government of Education

Legal provision for the government of education in this country began with the Act of 1642 in the colony of Massachusetts. This act and the subsequent "Old Deluder" Act of 1647 are often cited in the history of American education. They established precedents which still have significance for understanding the American school system.

These acts were passed by the central government of the Massachusetts colony to which the Commonwealth of Massachusetts succeeded. Thus, there was an initial establishment of the idea in this country that education was a matter of primary concern for the state government.

Certainly education is regarded today as a responsibility of each of the fifty individual states. The federal Constitution does not mention the subject of education and describes no power to provide it, yet all of the state constitutions make some provision for an educational system. All of them provide for the implementation of educational policy through action of state legislatures.

Some of the state constitutions provide for state and local agencies to administer the state's responsibility for education. The same matter is handled by legislation in the remaining states. At the state level, these responsibilities are assigned to (1) a state board of education, (2) the office of the chief state school officer, (3) specialized state education agencies, or (4) state non-educational agencies of government.

For purposes of the present discussion, the three types of state educational agencies are grouped together and referred to as the "state education agency." The question of the division of responsibility for education between local and state levels is an important one; hence, the relationships between local and state educational agencies are given systematic treatment throughout the present report. The division of responsibility between this group of educational agencies on one hand, and non-educational agencies of government on the other is also important, but this relationship is more commonly defined in relation to subject matter rather than agency and in the present discussion it is treated in this way.

There are differences between the three types of state educational agencies, however. The state board of education is usually regarded as a regulatory body whose functions lie chiefly in the formulation of state policy with respect to education subject to legislative directives and of their implementation through formally adopted rules. Nonetheless, the state board of education may also be assigned certain administrative functions and frequently acts in a supervisory capacity in the review of the action of local school districts and of other educational agencies in the state. It may also act in a judicial capacity in hearing and adjudicating disputes as provided by the statutes.

The chief state school officer is often (but not always) the executive officer for the state board of education. But important regulatory powers may be assigned to his office, important administrative functions are regularly assigned there, and in at least some of the states, the chief state school officers may hear and adjudicate educational disputes. All of these actions must be undertaken under either constitutional authority or by direction of the legislature.

There are also a variety of other educational agencies in various states. Some of these deal only with higher education and are of no concern in the present study which is devoted to the public school system. Others, such as agencies dealing with vocational education or the education of atypical children, are only infrequently involved in questions with which the present study is concerned. There are a few others such as the Georgia State School Building Authority and the Massachusetts School Building Assistance Commission who exercise important responsibilities in certain phases of local school operation. However, these also can be analyzed in relation to the particular subject matter with which they are concerned.

The System of Local School Districts

Actual school operation is largely a matter of local responsibility. Thus, the present investigation must focus much of its attention on what actually happens at the local level when school is conducted.

It has often been suggested that the Massachusetts acts passed during the 1640's to govern education were more honored in the breach than in the observance. But whenever these statutes were in fact implemented, some machinery for administration had to be used. These same acts delegated the responsibility for actual school operation to local agencies of government.

The basic government of the New England towns was provided through the practice of political democracy just as matters in individual local churches were decided by their membership in "whole group" democratic procedures. So the governmental affairs of the "town" (defined by practice as a central village plus any indigenous rural area) were determined by a meeting of all the voters in the town. Thus, school policy was determined by the citizens of the little community under democratic machinery. Execution of decisions was entrusted to a board of "selectmen" elected at the town meeting.

It should be emphasized that during the seventeenth century in Massachusetts and other New England colonies, the management of public education was regarded as a function of the municipal government at large. The selectmen actually managed the schools, but they did this ministerially, just as they managed police matters, poor relief, and other functions of local government.

The communities grew in population as time passed. As they did so, the problems of government multiplied, and the body of selectmen was increased in size. Eventually, the selectmen appointed special committees to see that streets were maintained, to administer poor relief, and to operate the schools. The New England "School Committees" originated in this general practice. These were, in effect, the first school boards. The members of the school committees were originally chosen from the membership of the city council (selectmen) and were subordinate to it.

The rise of the school district system in the latter years of the eighteenth century and the early part of the nineteenth overlapped the period of school government by the town somewhat and developed from it.¹ The details

¹R. Freeman Butts, and Lawrence A. Cremin, A History of Education in American Culture, New York: Henry Holt and Company, 1953, pp. 253-255, 429-431; Harry G. Good, History of American Education, pp. 384-386, 423-424.

of this development are available elsewhere, but for present purposes it is important to note that school districts developed as governmental units which were, for the most part, independent of any other local government. This political independence was developed irregularly and in some communities it was never achieved, but the politically independent school district is the characteristic agency of educational government in most of the states.

The school district system was commonly adopted for governing schools in new states as these were settled and new school systems were established. A common (although by no means the only) pattern of school government was carried on through annual or other periodic school meetings in which school policy was adopted by the voters in a democratic assembly. School boards were elected at these annual meetings, as the selectmen had earlier been elected in New England, to perform much the same functions. And while, with the passage of time, school boards came to have some decision making powers of their own, they were initially regarded as ministerial bodies whose chief function was to carry out the directives adopted at the school district meeting.

More sophisticated patterns of government have since been adopted for many types of school districts. However, vestiges of the original concepts governing school districts still remain embodied in the laws, practices, and understandings through which schools are administered. As a matter of fact, school district meetings are still used as a device of government in smaller school districts in rural areas of a number of the states.

The Nature of Local School Districts

Once school districts had sprung into existence, it became necessary to provide some legal definition for them and to describe their powers. To be sure, districts were agencies of government--local subdivisions of the state for educational purposes. But they were not general civil governmental agencies, clothed with authority to perform all the functions regularly ascribed to local governments. School districts were agencies with the particular function of school operation.

Without repeating unnecessary historical detail, it may be stated that school districts were described both by legislative act and by judicial decisions as "quasi corporations," thus implying or emphasizing that school districts are agencies with very limited powers. The conservative interpretation of school district powers was expressed in an early New Hampshire decision where the court said,

School districts are quasi corporations of the most limited powers known to the law. They have no powers derived from usage, their existence extending back but a few years. They have the powers expressly granted them and such limited powers are necessary to enable them to perform their duties and no more. . . .²

A more generous statement of school district powers appears in a judicial opinion in the state of Washington where the court said,

A school district is a . . . quasi municipal corporation and exercises such powers as the legislature has granted in express words, others fairly implied in the powers expressly granted, or those essential to the declared objects and purposes of the corporation.³

The conservative opinion leaves little room for the exercise of powers "necessarily implied in the powers expressly granted," or "essential to the declared objects and purposes of the corporation." Limitation of school district authority to the "powers expressly granted" by statute has been used by some courts to strike down school district practices which were not specifically named by the law and which the justices in question disapproved.

The liberal statement which appears in the Juntilla case has been used by other courts to approve various broad powers for local school districts and their officers. The construction has tended to amplify the power which a school district may exercise under the terms of express statutory language and to ratify new types of school board action in areas not described by statute but which have a direct relationship to "the declared objects and purposes of the corporation."

²Harris v. School District, 28 N. H. 58 (1853).

³Juntilla v. Everett School District, 178 Wash. 637, 35 P. 2d 78 (1934).

In actual experience, there is a disposition in many states to regard unfavorable decisions by the highest courts as interdictions against a particular practice. Unless the power in question is an extremely valuable one or unless public emotions are aroused, the general disposition is for local school districts to abandon practices condemned by the appellate courts rather than to seek legislative authorization to continue a practice. Thus, in the analysis of relationships between school districts and other local governmental agencies, the opinions expressed in the court decisions may have a decisive effect upon administrative practice.

The Classification of Local School Districts

In many of the states, the political mores hold that the governmental structure provided for local school district operation ought to be varied to recognize differences between local communities, and to permit, authorize, or encourage variations in school programs accordingly. This point of view is sometimes called "the doctrine of localism." It is usually implemented by the device of the "classification" of school districts. In general terms, this means that the legislature describes criteria by which individual districts are put in one category of school units or another.

Classification has commonly been based upon the recognition of actual or real differences between districts in matters such as:

1. Population
2. Geographic size
3. Assessed valuation or other evidence of financial resources
4. Educational program authorized (Grades 1 to 8; Grades 9 to 12; Grades K to 12; or other combinations).

The objective of classification is basically to grant certain privileges to one class or category of districts which are not granted to others, or (conversely) to deny certain privileges to one class of districts which are granted to others. This is not always done without citizen protest, and citizens have sometimes attacked the classification system on the ground that it violates the federal or the state constitutions. It is usually alleged that

the complainant has been deprived of rights as compared to others or that certain other persons have been granted special privileges and immunities illegally. The courts then have to decide whether the classification violates the constitutional sections requiring uniformity in the school system or prohibiting local and special laws. Some of these objections, of course, prevail. The question is really, Is classification under a particular act a legal or an illegal type of classification?

The application of classification to school districts has been litigated in a number of the states. The principle involved is well stated by a Pennsylvania court in an opinion which has been persuasive with many others.

The establishment, maintenance, and support of a system of common schools having been imposed upon the legislative department of the government, it must employ agencies to accomplish that object, and the manner of their selection is peculiarly within their discretion. . . . (the agents selected) and the methods employed need not be alike in all instances.

The power to classify school districts is not an open question in Pennsylvania, and no court should set up its idea of the necessity or reasonableness of a scheme of classification against the will or the people as expressed in the legislature unless it is clear that the latter has gone beyond constitutional limits in defining the classification objected to. The act of 1911 establishes school districts based upon population and this is a method of classification long recognized in our state. . . . There is no constitutional objection to the classification of school districts any more than of cities. . . . Classification may become as necessary for school districts as for cities. . . . It would be a most unfortunate clog on the improvement of our school system if Philadelphia, Pittsburg, Allegheny, and other cities could not have their high schools. . . or even their kindergartens without the necessity of imposing the expense of similar establishments on every borough and sparsely settled township in the state.⁴

The ideas that school districts have no inherent powers; that their powers are limited by statute; and that the powers of school districts may be

⁴Minsinger v. Rau, 236 Penn. St. 327, 84 A. 902 (1912).

limited by the category in which the school districts are placed under state law all have significance for the interpretation of the intergovernmental controls upon education. While the courts are sometimes generous in the interpretation of school district powers, the operation of this set of ideas in relation to school districts importantly negates any disposition to define school district powers in terms of tradition, customs, or common understandings. Generalizations regarding the intergovernmental control of education must also be tempered by the same ideas. Intergovernmental controls may apply to one category of districts and not to another, or they may apply differently to different categories of school districts.

Chartered School Districts

The same reasoning regarding the limited application of intergovernmental controls extends also to controls which are applied to chartered school districts. Chartered school districts are not numerous and they are not widely dispersed over the United States. The "charter" in question may be granted to a school district as such. More often the charter is granted to a "home rule" city and includes power to administer schools as one privilege granted to the city. Chartered units are found in perhaps a third of the states, but in some of these states there may be fewer than a half-dozen school systems operating under charter. The use of the chartered district as a device for providing school government has not been abandoned and upon occasion new additional chartered districts are formed.

Two conspicuous trends are observable in an opposite direction, however. The first of these is to include chartered school districts within the total number of districts governed by legislation of state-wide application. The second is to eliminate the chartered district altogether and to substitute a local school district organization provided under the general statutes.

The present study does not include any detailed analysis of the governmental provisions among chartered school districts. The very existence of a chartered district creates a presumption that the patterns of school government in use there provide exceptions to rather than illustrations of the prevailing policy in the operation of the American school system. This

need not always be true in fact; sometimes it is not true. But when the chartered provisions do not represent a departure from prevailing state policy, the rationalization for the existence of the chartered district may be difficult to maintain.

The liquidation of chartered school districts or action to bring them under general state laws is not always an easy matter, either politically or legally. "Home rule" is a powerful political argument, and there is often strong popular support for maintaining those governmental corporations which have been granted local autonomy by charter or special act.

Nonetheless chartered units have usually been established under the provision of the general law. They represent applications of public policy and except as protected by state constitutional provisions or conflicting statutory requirements are subject to amendment by legislative act.

Provisions Regarding Local or Special Laws

The constitutions of a considerable number of the states contain provisions forbidding the legislatures from passing "local or special acts" in general, or more commonly in relation to certain specific subjects of legislation. These prohibitions quite commonly extend to the control of education, and may apply to provisions for school districts. They do not apply equally in a few of the states, and where special legislation may be passed in relation to school government, the interpretation of the intergovernmental control of education acquires an added complexity.

The school system of the state of South Carolina provides a noteworthy example. The Constitution of South Carolina does contain a section forbidding local and special laws, but under the court decisions of that state, this section is held not to apply to legislation regarding county school districts.⁵ Thus the South Carolina statutes contain sections referring to individual county school districts in that state by name. Other statutes apply

⁵State v. Meares, 148 S.C. 118, 145 S.E. 695 (1928); Walker v. Harris, 170 S.C. 242, 170 S.E. 270 (1933); Moseley v. Welch, 209 S.C. 19, 39 S.E. 2d 133 (1946).

to all school districts in the state irrespective of these provisions. But in any state which has school districts designated by name in the statutes (and there are others) the question of intergovernmental controls must be examined separately for each named school district.

A somewhat different situation arises in the state of Maryland. The Constitution of that state also contains a prohibition against local and special laws,⁶ however, this section provides that the state legislature may enact special legislation dealing with subjects regarding which general legislation has not already been passed. There is no such general legislation in Maryland which authorizes local school districts to issue bonds. Thus, in order to authorize the issuance of school bonds by any Maryland school district, it is first necessary that the legislature pass an individual enabling act which will authorize this particular district to market this particular issue of bonds.⁷ Such a provision would not only be unnecessary; it would be unconstitutional in states which prohibit local and special laws under different constitutional terms.

Provisions such as these in South Carolina and Maryland (and in other states which have similar ones) may appear strange when compared to other more widely used practices. Actually, such provisions are well accommodated within the total norm structures which prevail in these states. The customs and mores--the understandings--under which governments are conducted and schools are administered in such states compensate for much of the divergence which might otherwise be expected. These provisions are different and may appear confusing to students of school government in other areas which define a "uniform" school system differently. Differences such as these must be taken into account in any of the states when consideration is given to intergovernmental controls that are exercised upon public education.

⁶Maryland Constitution, Art. 3, Sec. 33.

⁷However, certain chartered counties in Maryland have independent authority to issue bonds for capital purposes on behalf of schools.

The Effect of Permissive Legislation

Even after local prerogatives have been granted through classification, often there are individual communities or classes of school districts which are anxious to obtain additional prerogatives. These may be controversial, or they may represent the ambitions of individual localities which are distrusted or disapproved by others. The legislative device for granting such special prerogatives is "permissive legislation." The technique is to describe a particular category of school districts and to grant permissive authority for them to do certain things. The net effect of this is to make a sub-classification composed only of the districts granted these prerogatives.

The device of permissive legislation may be indulged so frequently as to have an iniquitous effect upon the uniform operation of schools. Permissive legislation has been used much more in some states than in others. If the device is carried to considerable lengths, it may be impossible to ascertain the particular rights, privileges or limitations imposed on any particular school district without reviewing the corporate history of the school district and the entire pattern of legislation which applies to it.⁸

Permissive legislation may be drawn to apply to other units of local government beside school districts. The question of intergovernmental relations may become extremely difficult to describe if, as is often the case, permissive

⁸This may be particularly difficult if the district is located in one of the so-called "non-code" states. The printed statutory codes of a number of the states do not include all of the acts passed by the legislatures. Certain categories of permissive acts (and other acts which apply only to limited classifications of particular subjects) are omitted from the general compilation. States which follow this practice are the so-called "non-code" states. The official statement of the laws in these states is contained in the regularly published acts of the legislatures. Some permissive legislation which grants special prerogatives to local school districts may thus appear only in the publication of the session laws in individual states--not in the compiled statutes. The existence of such permissive legislation in a given state and certainly the terms of the legislation may not be widely known. Since provisions of this kind actually constitute exceptions to the prevailing policies in school government, they are omitted from the present discussion. Hence, the present interpretations (like most others) must be read with recognition of this limitation.

legislation has been enacted dealing with both educational and non-educational agencies of government existing in the same community. The uncertainties may be concerned not only with the ordinary aspects of school operation, but with such other governmental services as street improvements and sewers.

Local Government--School Relationships

The interpretation of the relationships between local school districts and other units of local government becomes more difficult whenever both are given responsibilities relating to the same subject matter. Relationships may develop as a result of legislation dealing with municipalities, counties, and special districts as well as from laws like those already discussed which relate particularly to school districts. Variations in these relationships may result from the classification of local non-educational agencies, from individual provisions for municipal operation of schools, from the overlapping responsibilities which may be assigned to special governmental districts as well as to schools, and from features not yet firmly established in new patterns of governmental organization now under development.

The Classification of Local Governmental Units

Municipal governments are frequently classified as villages, towns, and cities. Any of these may be further classified into the customary first, second, third and other classes on the basis of population or other criteria which seem important to the legislatures. Counties may also be classified.

The object of this classification, as in the case of school districts, is to make special provisions for any of these governmental units to help them deal with the particular problems of their individual communities. Where, in any of these cases, educational matters are concerned, additional complications may arise. That is, the relationships between a Class II city and a Class III school district may be altogether different from those of a Class III city and a Class II school district. Similarly, the relationships of a Class III city may be greatly different in dealing with a Class II school

district as compared to the city's relationships in dealing with a Class IV school district.

These relationships are very difficult to assess on an abstract basis. Often these are one-of-a-kind relationships. Thus, information regarding relationships of this sort contained in routine reports and even that obtained as a result of direct inquiry to public officials must be weighed carefully. Data cannot be generalized and they cannot safely be regarded as illustrative of prevailing state policy. While descriptions of general policy can be reached, any generalizations made as a result of the consideration of specific information of this kind must be understood to be subject to many individual local exceptions.

Municipal Operation of Public Schools

In a number of the states, the public schools are operated in close association with the municipal government. In such cases, the question may be raised as to whether the local school agency is merely an arm or agency of the municipal government organized to operate schools, or whether the school agency and the municipality are in fact separate agencies. Where the associations are close, these questions are often confused by the citizenry at large. Even professional educators may casually regard the school district as an arm of the city government when in fact it may not legally be such.

The answer to these questions is clear in most of the states. School districts are independent units of government, not subject to control by the municipal authorities except under the precise terms of statute. As the Supreme Court of Michigan said,

Education is not a matter of local concern, nor is it part of local self-government inherent in the municipalities in which the schools are situated, but belongs to the state at large.¹⁰

¹⁰VanFleet v. Oltman, 244 Mich. 241, 221 N.W. 299 (1928). See also: Board of Education v. Townsend, 140 Ky. 248, 130 S.W. 1105 (1910); Board of Education v. Newport, 174 Ky. 849, 191 S.W. 871 (1917); State v. Gora, 195 Wis. 515, 218 N.W. 837 (1928); McCurdy v. Board of Education, 359 Ill. 188, 194 N.E. 287 (1935); Robertson v. Town of Englewood, 174 Tenn. 92, 123 S.W. 2d 1090 (1936); Boney v. County Board of Education, 203 Ga. 152, 45 S.E. 2d 442 (1947); Fowler v. Enfield, 138 Conn. 521, 86 A. 2d 662 (1952).

But the point is not equally clear in a half-dozen or more of the states and it has been extensively litigated in some of them. The issue has been raised repeatedly in New England. Notwithstanding the fact that the concept of state responsibility for education originated in colonial Massachusetts, the tradition of local governmental autonomy has been strong in New England. The statutes of the New England states commonly provide for rather close cooperation between municipalities and school authorities in the operation of schools. Thus, the question of state control of education has been raised from time to time, but where the issues have been clear, the decisions of the courts have been consistent that education is a responsibility of the state and not of local communities.¹¹ The independence of school committees has been upheld in a number of cases in Connecticut where the courts have been asked to distinguish between powers properly exercised by school committees as distinguished from those exercised by municipal authorities.¹²

The issues have been much more narrowly drawn in certain litigation which has appeared in Massachusetts. A considerable degree of local autonomy has often been delegated to local communities in Massachusetts through the use of permissive legislation. Some of these permissive laws deal with both municipalities and local school units. The result is that generalizations can sometimes be made, but their statement does not always apply equally to each school.

The Massachusetts laws have authorized a number of different plans under which municipalities may secure charters to govern the local communities. Many of the cities have secured charters under these authorizations, but the charter provisions do not always agree. Under some provisions, the school committee clearly becomes a department of the city and functions accordingly.¹³

¹¹Morse v. Ashley, 193 Mass. 294, 79 N.E. 481 (1906); Board of Education v. Board of Finance, 127 Conn. 345, 16 A. 2d 601 (1940); Gorman v. Peabody, 312 Mass. 560, 45 N.E. 2d 939 (1942); Bottolph v. Osborn, 119 Vt. 116, 119 A. 2d 686 (1956).

¹²State ex rel Town of Huntington v. School Committee, 82 Conn. 563, 74 A. 882 (1909); Groton and Stonington Traction Company v. Groton, 115 Conn. 151, 160 A. 902 (Connecticut, 1932); State ex rel Board of Education v. D'Aulisa, 133 Conn. 414, 52 A. 2d 636 (1947).

¹³Eastern Massachusetts Street Railway v. Mayor of Fall River, 308 Mass. 232, 31 N.E. 2d 543 (1941).

But school boards (school committees) are provided to administer the local schools even in cities where the school agency has by charter been made a department of the city government. This was recognized in the Eastern Massachusetts Street Railway case.¹⁴ In other cases, the Massachusetts Supreme Court has made it very clear that in educational matters the statutes protect the school committees from encroachment upon their discretion by the city council and limit the scope of action which the council may undertake to those matters which are defined by charter or by general law. In one particular instance, the Court said,

The policy of the Commonwealth is to establish a board elected directly by the people separate from other governing boards of the several municipalities, and to place the control of public schools within the jurisdiction of that body, unhampered as to details of administration and not subject to review as to acts performed in good faith.¹⁵

But while many of the Massachusetts cities have made the school committees an arm of the municipal government through the adoption of charters so providing, not all of them have done so. For example, the school committee in the city of Woburn has been held to be independent of the city government under the charter of that city.¹⁶ Many local charters require approval by the mayor of either budgets or expenditures.¹⁷ But in one other instance, the independence of a school committee was upheld where the court found that the city charter did not give the mayor the power to approve proposed school committee action.¹⁸

¹⁴Ibid.

¹⁵Hayes v. City of Brockton, 313 Mass. 641, 48 N.E. 2d 683 (1943); Leonard v. School Committee of Springfield, 241 Mass. 325, 135 N.E. 459 (1922); School Committee v. Gloucester, 324 Mass. 209, 85 N.E. 2d 429 (1949).

¹⁶Callahan v. Woburn, 306 Mass. 265, 28 N.E. 2d 9 (1940).

¹⁷Gorman v. City of Peabody, 312 Mass. 560, 45 N.E. 2d 939 (1942); McLean v. White, 216 Mass. 62, 102 N.E. 929 (1913); Parkhurst v. City of Revere, 263 Mass. 364, 161 N.E. 599 (1928).

¹⁸Casey v. City of Everett, 330 Mass. 220, 112 N.E. 2d 420 (1953).

Permissive statutes in the state of Texas have also authorized cities to adopt charters providing, among other things, for city administration of the community schools, although most of the provisions for municipal school operation have since been abandoned. In interpreting these provisions, the Texas courts have held that such charter provisions did not limit the power to the legislature to pass other laws governing the management and control of school districts, and any local action taken under charter provisions which conflicted with state laws was void. The municipal school operation was still governed by the general law, since the adoption of a city charter added nothing to the powers of a city to control its schools.

These generalizations were applied to litigation in the city of Ft. Worth, where the court held that the city and school district were still separate legal entities notwithstanding a home-rule charter, and the adoption of this charter did not deny the right of the state of Texas to levy a school tax in addition to that levied upon local property by the city of Ft. Worth.¹⁹

Another provision of the Texas statutes permitted the city councils of certain home-rule cities to assume the actual control of the schools and in effect to act as a school board. The Texas court ruled that where a municipality assumed control of its schools under these provisions, the action did not destroy the separate character of the city and of the school district, and did not merge the schools into the municipal government as such.²⁰ Rather, the city council acted in a double capacity as a governing body for both the municipality and the school district.

The issue of municipal control of school district policy has also been litigated a number of times in the larger cities in New York state. Here, the courts have held consistently that the city and the school district are legally separate, but that the relationships defined by statutes must be observed precisely. Most of these statutory matters have dealt with questions of finance. School districts in the larger cities of New York state are, to a high degree, dependent upon city councils for approval of their budgets.

¹⁹Zane-Cetti v. Ft. Worth, 269 S.W. 130 (Texas, 1926).

²⁰Temple Independent School District v. Proctor, 97 S.W. 2d 1047 (Texas, 1936).

Action of the councils in these cities in controlling the total amounts of school district budgets has been upheld, but attempts by the councils to control the expenditure of funds by school boards once the budgets had been approved have been consistently rejected.²¹

In summary it may be said that there are a number of states in which some school systems may be operated by agencies acting as departments of the municipal government under the terms of permissive state statutes. There is no state in which all of the school districts are thus operated. In general, where municipalities are authorized to operate schools under their charters, they are still subject to control by statutes of general application.

Counties and Special Districts

School districts also have legal relationships with a variety of other local agencies which may, by statute, have been assigned certain responsibilities in connection with school operation. These relationships exist with counties, and with sanitary districts, health and hospital districts, fire protection districts, street improvement districts, and a whole list of others. All of these are entities of limited powers. Some of them may be public (non-governmental) corporations; many of them are governmental quasi corporations. But in any of these situations, the relationships between the school districts and other local agencies are governed by statutory provisions.

A few figures will indicate the scope of this problem. Recently, the Advisory Commission on Intergovernmental Relations reported that in the 174 Standard Metropolitan Statistical Areas of the United States²² in 1957 there were 16,976 local government units of all kinds. Of these 6,563 were school

²¹Fleishmann v. Graves, 235 N.Y. 84, 138 N.E. 745 (1923); Board of Education v. King, 304 N.Y. 973, 110 N.E. 2d 895 (1953); Gunnison v. Board of Education, 176 N.Y. 11, 68 N.E. 106 (1903); Titusville Iron Company v. New York, 207 N.Y. 203, 100 N.E. 806 (1912); Brannon v. Board of Education, 245 N.Y. 8, 156 N.E. 78 (1927); Divisich v. Marshall, 231 N.Y. 170, 22 N.E. 2d 327 (1939).

²²Defined as counties containing a municipality of fifty thousand or more population.

districts, and approximately 3,800 of the remaining number were special districts of some other kind.²³ The same source reports that in 1960, seventy-nine of the (then) 212 metropolitan areas represented intercounty areas and twenty-six of them included territory in two or more states. This latter group included more than five thousand local governments, more than one-fifth of the nation's people, and almost one-third of its manufacturing activities. The Commission stated,

The problems of matching political jurisdiction and responsibility with needs and resources are compounded in these metropolitan areas because of additional sets of state constitutional provisions, statutory requirements, and administrative regulations are involved.²⁴

The six thousand school districts mentioned in the Commission's report do not always have organic and legal relationships with the 3,800 other special districts in the areas, or with the slightly more than 7,000 counties, municipalities, and other local governmental units. But legal relationships do exist very frequently. They often involve questions which are important enough to add greatly to the problems of government, finance, and operation of all kinds of local governmental activities--especially schools.

New Provisions for School Government

From time to time, innovations are proposed in various states to reorganize the governmental structure provided for administering schools. Consolidation programs are a familiar example. Occasionally, there are other innovations which differ markedly from the traditional patterns of reorganization. Two of these are cited here. They illustrate a useful generalization--that the patterns of interorganizational control of schools are not static; they are appropriate subjects for periodic reexamination.

²³Advisory Commission on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas, Washington, D. C.: The Commission, 1962, pp. 5-9.

²⁴Ibid., p. 10.

In 1945 the Massachusetts Legislature authorized a program to encourage the establishment of regional and consolidated public schools, and to provide financial assistance to cities and towns in the construction of school buildings.²⁵ The school units formed under this act frequently include two or more municipal areas; hence, the previous attachment of the school committee to the municipality is no longer possible, and new relationships have to be defined.

Each regional district is allowed to design its own plan for representation on the school committee, for methods of apportioning costs and expenses, for transportation, and for the adoption of the school budget. Thus, there may be major differences between one school district and another. Generalizations regarding school district-municipal relationships in Massachusetts are less dependable where regional districts are concerned.

Uncertainty also exists in the organization of schools under the Alaska Borough Act.²⁶ This act provides that all organized boroughs must establish, maintain and operate a system of public schools in the manner provided by general law for city school districts. State laws will continue to apply to borough schools and the Alaska Department of Education will continue to supervise them.

A local board of education is provided for by the Borough Act. The board is subordinate to the representative "borough council" which is the legislative and administrative body for a borough. Thus, theoretically, the school district will operate as a department of the borough government.

The first Alaska boroughs are now beginning operation. Uncertainty about the relationship between school authorities and the borough government originates in a considerable measure of autonomy which may be exercised by the citizens of each borough in the design of their individual borough governments. The Alaska Legislature has conservatively delayed legislation describing certain details of borough government pending experience with the new type of

²⁵Massachusetts, Acts and Resolves, 1948, Chapter 645.

²⁶Session Laws, of Alaska, Chapter 146, 1961.

organization. These two uncertainties may or may not concern schools. Thus, some doubts with respect to the relationships between local school units and other local government units in Alaska must await developments for their resolution.

Summary

The legal structure through which education is provided in this country is still in the process of development. The relationship between educational and other governmental agencies is also in a continuous process of adjustment and accommodation. The organizational patterns currently identifiable have developed historically in response to changing needs in society. As the urbanization of the population of this country increases and living patterns become more complex, further adjustments must be anticipated to satisfy changing conditions. Individual modifications of this kind can already be identified.

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CHAPTER III

THE RESTRAINT OF FISCAL ADMINISTRATION

The relationships between school authorities and other agencies of civil government have been more often considered in relation to fiscal matters than in any other phase of school operation. No doubt this is partly a matter of public interest. Except for the instructional program of the school, no other aspect of school operation touches so many people or touches them so continuously as does the matter of finance.

Matters of finance (like the provisions of law) permeate substantially all of the aspects of the administration of schools. It has sometimes been said that, "Every educational decision is also financial." This is substantially the same as to say that there is a price tag on anything that goes on in school. Schools are operated to provide an educational program. But it is necessary to maintain a continuous evaluation of the costs associated with any educational activity under consideration.

It follows that the power to control or to restrain the expenditure of funds in a school system is equivalent to the power to influence what goes on in school. While it is true that two alternative activities in school operation may have equivalent price tags so that some independent discretion still remains with school officials in determining school policy, still the ability to control expenditures has an important continuing relationship to the specific character of the school program.

These matters give some indication as to why there is some interest in the control of school finances. It also indicates why the matter of inter-governmental controls of school policies relating to finance has had a fascination for serious students of the administration of the public school system.

The effective operation of the public schools often depends upon compliance with the precise requirements for intergovernmental action. Policy formation at either the state legislative or local school board levels may be facilitated by knowledge of the experience which has been gained as to alternative ways of handling various problems.

Fiscal administration of schools begins as tax policy is considered, appropriations are authorized, and tax levies are made. It extends to the time that the financial records have been completed and audited. The entire process can be said to have a few very pointed objectives.

1. A provision of adequate educational services, with the greatest educational and other social benefits for the amount of money spent.
2. Honest use of and accounting for school district funds within the limitations and stipulations provided by law.
3. A record of financial operations which is subject to analysis and can be used to evaluate the success or failure of current financial plans and to serve as a basis for the projection of future plans.

These objectives are sought through, first, a framework within which the various activities of financial administration can operate, and second, a set of specific controls for the management of funds. The present chapter is concerned with the general framework.

Intergovernmental Relationships in Fiscal Matters

One of the most often discussed problems of intergovernmental relationships in school administration has been that of the so-called "fiscal dependence or independence" of school districts. A "dependent" school district is usually thought of as one whose annual budget is subject to restraint and approval or veto by the municipal government. An independent district is one where the district has the authority to adopt its own budget.

The matter of fiscal dependence or independence is really subject to much more rigorous definition. In addition to the relationships commonly identified between school districts and other municipal agencies of government,

at least some classes of school districts in a considerable number of the states are required to submit their budgets to state educational agencies for recommendation and approval. Thus, the question of local independence is not alone a question of relationships between school districts and municipalities; it is also a question of relationships between the school districts and various state agencies of government.

Even beyond dependence on a municipality or a superior education agency for the approval of local financial plans, restraints are found to be contained in additional legal requirements such as these:

1. The prescription of forms and procedures (including coding regulations) for financial accounting in schools.
2. The designation of an ex-officio, non-school treasurer to receive, hold, and disburse school district funds.
3. A requirement that individual transactions be approved by some non-school official.
4. A post-audit of school district accounts--especially when conducted by an ex-officio municipal or state auditor.

Financial Accounting in School Districts

The financial accounting system prescribed for use in local school districts may appear to be a rather innocuous administrative device, having little relationship to questions of how to spend school district funds. Yet it is possible to specify accounting regulations which may greatly restrict the independence of school boards in deciding how to spend the school district's money. There is little question that the ability to control the accounting system itself can be used to influence expenditures to a very material degree. If, for example, there is a percentage limitation on the amount of funds which may be expended for the school library, and if expenditures for all items such as textbooks, audio-visual films, maps and charts, or other items can be classified as "library" expenditures, totals can be controlled. If a school district can be required to classify the architects' services under the heading of administration, the administrative costs of running a school system can be made to appear excessive.

Public school fund accounting is a product of the twentieth century. It began to take substantial form as a result of a series of conferences sponsored by the U. S. Office of Education in the period around 1910 and of the wide influence of the publications which resulted from these conferences.

The first of the publications which dealt with financial accounting was issued by the National Commission on Uniform Records and Reports which had been organized in 1909. This report, Financial Accounting for the Public Schools, was published by the U. S. Office of Education in 1913. During the same year (1913) the Handbook of Municipal Accounting was published by the Comptroller of New York City in cooperation with the Bureau of Municipal Research. These two reports were antecedent to the so-called "Case Handbook."¹ This handbook was highly influential in the development of school accounting for many years.

During the period between World War I and World War II, great efforts were made to improve all aspects of school administration. In addition to systematic training programs for the preparation of school administrators, leaders in the field were systematically developing a literature dealing with school administration. The findings of both research and philosophy in education were combined with contributions from economics, political science, and the management of business and industry in developing theory and practice in school administration. The financial support and fiscal management of schools received primary attention both in research and in publication.

These scholarly and professional efforts were further implemented by the development of commercially printed accounting and reporting forms which were widely used by local school districts. Other accounting adaptations were made by state departments of education for use in their own individual states. All of these systems tended to standardize around a group of budget categories, usually from six to ten in number, which included such items as administration, instruction, operation, maintenance, fixed charges, and debt service. Most of public school accounting systems followed this general pattern until the

¹Hiram C. Case, Handbook of Instructions for Recording Disbursements for School Purposes, Albany, New York: C. F. Williams and Sons, Incorporated, 1916.

publication of Handbook II by the U. S. Office of Education in 1957.²

Parallel to these developments and overlapping them, the movement for an audit of school district accounts developed. Requirement of formal audits encouraged the adoption and further development of standardized accounting forms. Whenever legislative action was considered in an individual state on this point, a blunt question was raised as to who should prescribe the accounting forms and the accompanying regulations through which the accounting was to be administered. Some states sought to control this directly through an act which prescribed budget forms and other accounting details. Others attacked the question indirectly through the assignment of responsibility to administer state financial programs or to audit school district accounts. In general, there were two alternatives: first, the state educational agency; second, one of the state fiscal departments. In certain cases, responsibility was assigned to these agencies jointly, or given to one agency with provision for consultation with the other.

Logical support can be mustered for any of these positions. If the accounting forms were to be designed to facilitate school operation, it was very logical for the state education agency to be designated to prescribe them. This agency could be expected to know what the problems of school operation were and to have a realistic point of view with respect to the capabilities of the people who might administer the accounting system.

On the other hand, there is a certain logic to assigning responsibility for the design of accounting systems and regulations to state fiscal agencies. This is particularly persuasive if the objective of the accounting system is expected to be the prudent administration of public funds and accurate accounting for them, or if it is assumed that the reports of the financial affairs of schools ought to be comparable to reports of other governmental services.

²Paul L. Reason and Alpheus L. White, Financial Accounting for Local and State School Systems, State Educational Records and Reports Series: Handbook II, U. S. Office of Education Bulletin, 1957, No. 4 Washington, D. C.: United States Government Printing Office, 1957. It is noteworthy that the first accounting systems developed after 1910 and that suggested by Handbook II were both outcomes of projects sponsored by the United States Office of Education in which major contributions were made by scholars, officials, and associations in the general field of public school finance.

To some degree, the use of the accounting system as a device for controlling school district finances is more historical than current. Certainly, as time passes and experience is gained, the opportunity and temptation to take capricious action in ruling on the accounting for school expenditures slowly diminishes. In addition, steady progress has been made in the adoption of Handbook II as a basic pattern for the design of school district accounting systems all over the country.

However, while a few states have deliberately adopted Handbook II and the related materials without change, the states have more typically modified the accounting forms and have adapted them to meet their own problems. Modifications have usually been designed in such a way that standard data for reporting are obtainable, but variations are commonly made to simplify the accounting procedures for use in small school districts, to elaborate them for larger districts, or to permit the growing use of data processing equipment.

In effect, Handbook II is used as a kind of "standard code" over the whole country.³ But whenever modifications are made, new questions must be raised as to the propriety of school district financial action, and as to the record which must be made of it in the accounting system. These questions are likely to appear in connection with the official functions of ex-officio school district treasurers, of other public officials who have supervisory authority over certain school district action, and particularly of the school auditors.

Restraints by Ex-Officio School District Treasurers

Upon occasion, the school district treasurer may have authority to influence or restrain the use of public school funds.⁴ The treasurer may be a member of the board of education itself. He may be an officer named by the board from its own membership or some other designated person. He may be

³The general use of standard codes is discussed in greater detail later in the report. See infra, Chap. VI.

⁴In this discussion, the school district treasurer is assumed to be the individual who receives, accounts for, and pays out school district money, whatever his title. Ordinarily, he is not the depository for the funds although, in unusual situations, he may also act as depository.

designated as the treasurer by the statutes. In the latter case, he may still be a member of the board, but he is more likely to occupy another public position and to serve as treasurer of the school district ex-officio.

The duties of the treasurer may be described by statute or by the regulations of the local school board which appoints him. The scope of authority of a school district treasurer under either of these conditions is limited by the language used.

However, in a great many cases the school district treasurer is only named; his duties are not described in detail. In such cases, he is presumed to have the usual powers attached to the position of treasurer. These must usually be inferred from other related legal provisions or deduced from precedents arrived at in previous court decisions.

It might reasonably appear that a school district treasurer is a simple ministerial officer. In such an instance, the treasurer would be expected to receive school district money and to deposit it in a bank or other designated depository. He would then pay it out when a bill had been allowed by the school board in regular meeting and an order for payment had been properly drawn and signed. This is the normal procedure for the great bulk of financial transactions of the school district. Actually, there are some rather broad variations from it. The status of the school district treasurer as a ministerial officer is dependent upon the terms of the statute or regulation which defined his authority. Ministerial status should not be too broadly presumed.

Under the statutes of a number of the states, the school district treasurer, whether a member of the board or not, has been held to be a ministerial officer. Thus, in an Oklahoma case, the Supreme Court of that state declared that,

Nothing short of willful misconduct will subject an officer such as an officer of a school district to liability for acts done in the exercise of his official discretion especially where the officer has violated no positive law. . . . The act of a treasurer of an independent school district in paying a warrant fair on its face and drawn on an existing appropriation is purely ministerial and he is under no legal duty to examine

the legality of such appropriation and in the absence of bad faith is not personally liable to the district merely because the appropriation is later declared illegal by the courts.⁵

Similarly, in a North Dakota case, the Supreme Court of that state held the treasurer to be a ministerial officer and absolved him of liability for what might have been an illegal payment. In this instance, warrants were paid by the school district for tuition for a number of children who attended a private school district. These payments were clearly illegal, but the treasurer was exonerated from personal liability in paying them. The Court said,

. . . . The treasurer is not a member of the board. . . He is clothed with no authority with respect to the allowance, approval of bills against the district or with respect to the issuance of warrants and payment thereof. The responsibility for the conduct of the business of a school district is that of the board and not of the treasurer. The statute here under consideration requires that he "shall pay all warrants properly drawn and signed when presented, if there is any money in his hands or subject to his order for their payment." He is vested with no discretion other than to determine that the warrants he shall pay are properly drawn and signed. He is merely a ministerial officer. Since the duty of passing upon and of approving bills against the district and of authorizing and issuing warrants in payment thereof is the duty of the school board and the treasurer is not a member of that board we cannot believe that the Legislature in enacting Sec. 1168 intended other than the plain import of the language therein used. Neither the treasurer nor his official bondsmen should be held responsible for the conduct of other officers over whom the treasurer as such has no control. The law and the official bond constitutes the sole measure of the treasurer's liability.⁶

Where the school district treasurer has been defined as a ministerial officer, it is usually held that he must pay all orders presented to him which are properly signed and valid on their face. The court of appeals in Illinois said,

⁵Board of Education v. Cloudman, 185 Okla. 400, 92 P. 2d 837 (1939); State ex rel Murphy v. Board of Education, 185 Okla. 655, 95 P. 2d 104 (1939).

⁶Prairie School Township v. Haselen, 3 N.D. 328, 55 N.W. 938 (1893).

As we read the statute, it seems to us that the school treasurer has the purely ministerial duty of paying out funds on order of the school directors. He has no discretion in connection with or control over the issuance of school orders by the school directors or any discretion as to what orders shall be paid or not paid if funds are available.⁷

These rulings are consistent with the legal expectation that a ministerial officer will perform his duty when the conditions precedent to it have been fulfilled. The application of the rule to school district treasurers was discussed by the Supreme Court in a North Dakota case in which the Court said,

Practical reasons. . . may be urged against the construction for which the plaintiff contends. (That a ministerial treasurer is personally responsible for funds paid under an illegal order.) The school business may be greatly interfered with if the treasurer, a mere ministerial officer, were required to consider the purposes for which warrants were issued and then determine whether he should take the risk of such purposes being proper and lawful. A wholly different question would be presented if collusion were shown to exist between the treasurer and the board whereby warrants were unlawfully issued and paid. But this is not the case here. Thus, considering the statute, there is in the case no liability shown as against the treasurer because she paid the warrants or had knowledge of the purposes for which they were issued.⁸

These precedents are not universally followed. In a number of states the courts have held that school district treasurers are liable for funds illegally expended. Thus, in an Arkansas case, the court said,

When a warrant is presented to the treasurer for payment for an unauthorized purpose, the treasurer pays the same at his peril, and is personally and

⁷Bernstein v. School Directors, 319 Ill. App. 403, 49 N.E. 2d 314 (1943); See also School District v. Long, 199 Mich. 364, 165 N.W. 604 (1917); Bailey v. Duffy, 45 R.I. 304, 121 A. 129 (1923); Board of Education v. King, 304 N.Y. 973, 110 N.E. 2d 895 (1953).

⁸School District v. Shinn, 61 N.D. 160, 237 N.W., 693 (1931).

individually liable to the district for the monies unlawfully expended.⁹

The school district treasurer may occupy a much different position under other statutory provisions. In some cases, the statutes may place the school district treasurer in much the position of the pre-auditor subsequently discussed in this chapter. They may impose upon the treasurer the responsibility for assuring himself that payments represented by school district warrants are for a public purpose authorized by law, and that an appropriation is available for paying them.¹⁰ Such statutory provisions may require the treasurer to "check" the action of local school boards and possibly act as a restraining agent upon school board discretion.

The Statutes of Arizona, where the county superintendent acts as treasurer for all school districts in the county, illustrate this point. The section provides,

The superintendent, on the voucher of the governing board of any district, shall draw his warrant on the county treasurer for all necessary expenses against the school fund of any such district. The warrants shall be drawn in the order in which the vouchers therefor are filed in his office. A warrant shall not be drawn for any expenditure for a purpose not included in the budget of such school district or for any expenditure in excess of the amount budgeted and not theretofore expended; except for expenditures authorized by the board of supervisors in accordance with Section 15-1233.¹¹

⁹Hendrix v. Morris, 134 Ark. 358, 203 S.W. 1008 (1918). Compare Superior Grade School District v. Rhodes, 147 Kans. 29, 75 P. 2d 251 (1938); Joint Consolidated School District v. Johnson, 163 Kans. 202, 181 P. 2d 504 (1947); School District v. Fidelity Deposit Company, 342 Penn. 322, 21 A. 2d 33 (1941).

¹⁰Note the position of a school district in a case where (1) accounting forms and procedures including a coding guide are promulgated by the state education agency, (2) the school district treasurer pre-audits vouchers, and (3) a state auditing office post-audits expenditures. Such conditions closely circumscribe the discretion of the board of education. Where disagreements regarding expenditures develop between these restraining agencies, litigation may be necessary to extricate the board from a difficult position.

¹¹Arizona Revised Statutes, Sec. 11-514.

The Attorney General of Arizona has ruled that this and related sections of the Arizona Statutes are "declarative of the intent of the Legislature to make the county school superintendent responsible for a careful account of all money spent by the individual school districts."¹²

It is sometimes remarked that the work of ex-officio auditors, treasurers, attorneys, and others for school districts is in fact a "service" performed by the general government for school districts. Although fees are sometimes assessed against school districts for these services, it is true that they do constitute a service. It is no less true that these officials occupy a position where it becomes possible for them to exercise major restraints upon the discretion of local school districts and their officers.

Restraints by Other Public Officials

A number of additional public officials may, under one circumstance or another, have responsibility for approving the action of local school officials. The school board's attorney may be required to advise on the legality of certain proposed school board actions. In other cases, comptrollers, insurance commissioners, or others may be authorized to approve or restrain school officials in matters of concern to their particular departments.

Attorneys

Where the local school district attorney is employed by the board, little controversy is likely to develop and few restraints (apart from those existing in the law) are likely to be imposed since the terms under which the employment exists can be defined by the board.

A somewhat different situation exists if a city or county attorney is designated by law as the attorney for the school district. Restraints originating in the attorney's non-legal judgment are then possible. This condition achieves greater importance if the ex-officio attorney is also the

¹²Opinions of the Attorney General, Arizona, 1956, p. 11.

the attorney for the ex-officio treasurer of the school district. Some restraints upon school district actions are also possible as a result of rulings by the state's attorney general.

The ex-officio attorney is in a relatively strong position to influence school board action since he is usually a public officer. He is not responsible to the board of education for his appointment, but is responsible to others for it. Neither is he subject to dismissal by the board. Thus, both by reason of his status as a public officer and by the security of his tenure, he has considerable freedom to urge his opinions as a restraint upon proposed school district action.

The possible character of this action was described at length and with approval by the Supreme Court of Minnesota in discussing the relationships of an employed attorney to the board of education. The Court said,

The board of directors of any private corporation of the magnitude, importance, and pervasive context which characterize the Duluth school district would, as a matter of business sense and safe administration, require the services of counsel. The usual thing would happen. The executive head would select some lawyer having the confidence of the management and retain him upon an annual basis. . . . Businessmen are adverse to being shuttled from one lawyer to another simply to suit the convenience of others. Their desire is for some one adviser to whom they can go when occasion arises and get prompt and dependable answers to their questions. They want advice backed not only by knowledge of the law but also by experience with the other "non-legal" factors so often present in the problems submitted by businessmen to their lawyers. . . . We cannot agree in the distinction made (in the lower courts) between what were supposed to be (the attorney's) "legal" and "non-legal" services. Once a lawyer becomes familiar with the affairs of an important and continuing client, he is constantly advising on matters which may involve both questions of law and fact. Many courses of action which are legal are unwise. The lawyer who in vouching for their legality does not at the same time point out their lack of wisdom, if it be known to him, is an incompetent adviser. In counseling, he does not by so much cease to be a legal counsellor. His knowledge of the law is not the only thing wanted. Frequently,

more important is his knowledge, gained from experience, of how the law works in application to the affairs of men. . . .¹³

This discussion represents, as the Court intended, a description of a favorable relationship between an attorney and his school district client. It is also a true-to-life exposition of a situation which might develop if an ex-officio attorney decided to urge biased opinions as desirable school board policy. There appears to be little litigation which deals with this particular question. The position of the ex-officio attorney vis-a-vis his school district client is not conducive to easy attempts at litigation.

To balance the favorable description of the school attorney's role made by the Minnesota Court, it should be pointed out that the opinions of the public attorney who acts as counsel ex-officio for the school board, like the opinions of the attorney general given to government officials, are advisory only. When an attorney gives an opinion to a board of education, he is not acting as a legislator nor as a judge. He is acting as a member of the executive department of government. Reliance by a board of education upon an official opinion will not justify their action, nor excuse them from its consequences.¹⁴ While it is often said that the failure of a public body to follow the professional advice of its attorney approaches negligence and may possibly expose the members of a board to its consequences, still that advice is not binding on the board to the extent that their action must be controlled by it.

A similar question as to the weight of specific legal advice was considered in a suit involving the discretion of a department of state government. In this case, the court said with respect to the department in question,

They are entitled to the opinion and advice of the attorney general upon questions of law, but they are not necessarily controlled by that advice in matters especially committed

¹³Lindquist v. Abbott, 196 Minn. 233, 265 N.W. 54 (1936).

¹⁴Leddy v. Cornell, 52 Colo. 189, 120 P. 153, 1913 C, Ann. Cases, p. 1307 (1912).

to their care. If the law were otherwise, any executive office of the state could be controlled by the opinion of the attorney general specifying what the law requires to be done in that office.¹⁵

Other Officials

Other public officials who have responsibility for approving actions by the school board or other local school officials are usually authorized to act only within their own general areas. On many fiscal matters, the state comptroller general or another official with similar duties may have responsibility for ruling on school district actions. In the state of New York, to cite an individual example, the State Commissioner of Education, the state's Attorney General, and the State Comptroller all have responsibilities for making legal judgments regarding certain school board or school district actions. Attorneys on the staff of each of these officials specialize in school district questions. While conflicts might possibly develop between these agencies in the rulings which might be applied to local school district action, actually the practice has been for the agencies to coordinate their replies and for one agency to rely on the precedents established by the others (as well as his own) when questions are submitted for determination.

In other situations, state insurance commissioners, state purchasing agents, and a variety of other officials may sometimes exercise controls over local school district action. Decisions by any agencies or officials such as these may restrict the discretion which local school officials may otherwise exercise, but the range of this supervisory action is usually quite limited.

The Audit of School District Accounts

The financial administration of any public enterprise includes a record of its fiscal transactions and (usually) a periodic appraisal of the financial records. Where government agencies are concerned, this includes a

¹⁵Follmer v. State, 94 Neb. 217, 142 N.W. 908, 1914 C, Ann. Cases, 151 (1913).

record of revenue and non-revenue receipts on the income side of the ledger. It includes, on the expenditure side, a record showing that expenditures were based on a legitimate claim which has properly been pre-audited or approved and paid by the proper agency, office or official.

The Pre-Audit of Claims

The rules governing auditing and accounting have been considered by the courts in the cases involving audits arising at the state level. Often the issues have been between an agency in the executive department of the state government and an official designated to pre-audit claims originating in that department.

These issues are often matters of statutory interpretation. The pre-auditor himself exists by virtue of statute, and his duties are subject to statutory definition. However, these definitions have sometimes been so general in terms that there have been frequent resorts to litigation in order to define the proper limits for the auditor's authority.

The office of a pre-auditor exists for very definite purposes. It is a part of the commonly used political device of checks and balances. As defined by statutes and court decisions, the auditor's functions include checks to assure that:

1. Claims are for a purpose permitted by the constitution and the statutes of the state.
2. Claims are for a public as distinguished from a private purpose.
3. A sufficient properly adopted appropriation is available for paying the claim.
4. The claim has a legitimate basis--i.e., that it does not appear to be fraudulent or the amount unrelated to the value received by the state.

All of these matters ought to be (and typically are) the concern of the agency issuing the claim. These agencies, whether a single official or some commission of the state, are clothed with discretion as to what claims

ought to be paid. The auditor, however, provides a check upon the proper use of these funds within the scope indicated.

The determination of the balance between the perogatives of the issuing agency and those of the pre-auditor has been the responsibility of the courts. In one series of court decisions from Arizona, for example, the courts were faced with questions as to this division of responsibility between a pre-auditor and other state agencies. The sensitivity of the question of the division of authority can be illustrated by quotations from three of these Arizona cases.

Neither the auditor nor the governor may lawfully reject a claim which is for a public purpose, but such officials must necessarily use their independent judgement on every claim presented to them to determine whether a claim is for a public purpose. And, before the court may review their decisions, they must be given opportunity required by statute to make a final decision on the matter.¹⁶

Where a claim shows on its face that it is for a public purpose, it is properly itemized, and it is accompanied by vouchers and is approved by the head of the department, and there are still unappropriated funds for the payment thereof, the state auditor is not required to investigate further but should approve the claim and issue the warrant.¹⁷

The necessity, expediency, advisability, or policy actuating the creation of debt by university and state colleges is no official concern of auditors, but the auditor must know that a claim against the funds of the university and state colleges falls within the purpose and appropriation against which the warrant is to be charged, and that the entire legislative purpose of appropriation is actually for a public purpose and if the claim is not for a public purpose, the auditor must disapprove the claim regardless of the fact that it is within declared legislative purposes.¹⁸

¹⁶Hutchins v. Frohmiller, 55 Ariz. 522, 103 P. 2d 956 (1940).

¹⁷Frohmiller v. Board of Regents, 64 Ariz. 362, 171 P. 2d 356 (1946).

¹⁸Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P. 2d 833 (1949).

The distinction thus described between the range of discretion given issuing agencies and that given the pre-auditor in determining whether a given expenditure is in fact for a public purpose or is within the terms of an appropriation are narrow indeed. Each time a new kind of expenditure arises, the question must be raised again: Whose responsibility is it to determine whether this is a legitimate purpose for an expenditure? In some cases the school board may decide. In others the state superintendent, a state auditor, or the attorney general may rule officially. If there are disagreements, the issue will probably go to the courts.

If the spending agencies are desirous of preserving their discretion in such matters, it is important that the question be presented to the courts when the issue first arises. An educational agency is charged by the law with providing educational service. For this purpose, appropriations are made and the discretion of governing boards and officials is employed in spending funds to create the services. If there is a disagreement with auditing officials as to the legitimacy of certain expenditures or categories of expenditures, this difference ought to be composed. Delay in clarifying the matter may result either in the waste of public funds, or may reduce the quality of a public service.

Both school officials and auditors have responsibilities in the determination of the propriety of expenditures. This point has been well stated by the Utah Supreme Court when it said,

The executive and administrative officers of the government are bound to give effect to the laws which regulate their duties and define the sphere of their activities, and in so doing they must necessarily put their own construction upon such acts. . . . Now such constructions are never binding upon the courts. . . but it is a rule that. . . the contemporaneous construction put upon a statute by the officers who have been called upon to carry it into effect made on the basis of their constant and uniform practice for a long period of time and generally acquiesced in and not questioned by any suit brought, or by any public or private action instituted to test and settle construction in the court, is entitled to great respect; and if this statute is doubtful or ambiguous, such practical construction ought to be accepted as in accordance with the true meaning of the law unless there

are very cogant and persuasive reasons for departing from it.¹⁹

This is not to say that mistakes are ever to be countenanced. The courts will correct undoubted errors. But in a zone of doubt the prevailing construction is likely to be upheld. Thus, if a valuable area of school district discretion is challenged, the proper action is recourse either to the legislature or to the courts.

The Post-Audit

The discussion of auditing this far has been primarily concerned with the pre-audit of accounts, and much of the discussion has revolved about the practice of auditors in dealing with other than school district accounting. Educational expenditures are usually not subject to a pre-audit by an independent official. Bills are paid after they have been presented in school board meetings and approved for payment by the school boards.

Later, school accounts are usually subject to a post-audit. But while post-audits do not prevent expenditures from being made, they may, if audit reports are critical of already completed expenditures, create embarrassments for school officials and influence the course of future expenditures. Illegal expenditures may be recoverable from school officials through court action in certain cases.

It must be observed that the general rules which have been hammered out by the courts in dealing with pre-auditors are very influential in determining issues which arise in connection with post-audits. The auditor's duties are subject to legislative control. However, statutes often fail to spell out the scope which school audits should take or to define the auditing procedures which should be followed. Where this is the case, the nature of the

¹⁹State Board of Land Commissioners v. Riris, 56 Utah 213, 190 P. 59 (1920). See also Hunton v. Commonwealth, 166 Va. 229, 183 S.E. 873 (1936); State Board of Education v. Carwile, 168 Va. 663, 194 S.E. 855 (1938), State ex rel Dewey Portland Cement Company v. Obrien, 142 W. Va. 451, 96 S.E. 2d 171 (1956).

audit is likely to be determined by court decisions in previous cases or by the customs of the auditing profession.²⁰

Provisions regarding the post-audit of school district accounts show considerable variation from one state to another. The following general provisions may be observed.

1. The statutes of a state may be silent as to the legal necessity for any audit of school district accounts.
2. No audit may be required, but official financial reports may be required to county or state superintendents or to other stated officials.
3. No particular audit may be required of school district accounts, but school boards or fiscal officers of school districts may be required to make a public report of the income and expenditures of the school district for the fiscal period. This is a common provision where there is a school district meeting.
4. An audit may be conducted by a committee of the school board or by a committee of local citizens locally elected for this purpose or appointed by the school board.
5. An audit may be conducted by local non-school officials on an ex-officio basis. Audits may be performed by city or county treasurers, county auditors, or others.
6. An audit may be conducted by a state department of audit and inspection.
7. Audits may be conducted by an auditing division in the state department of education.
8. Local school districts may be directed or permitted to secure audits by a certified public accountant or other licensed or approved accountant.
9. In any of these cases, there may be a requirement that certified copies or reports of the audit be filed with stated officials.
10. Some combination of these may be required.

²⁰Hicks v. Davis, 100 Kan. 4, 163 P. 799 (1917).

There are also contingent provisions for audits in the statutes of certain states. One provision permits state education agencies to audit school district financial accounts in addition to any other audits which may be required. The agency may also be permitted to audit attendance or transportation records. The object is to provide an additional check to assure that regulations are being complied with for any state support programs for school expenditures in general, or for special support programs for textbooks or transportation.

Another contingent provision permits local citizens in certain states to demand an audit of the school district's accounts. In such cases, the statute may provide that a certain percentage of the electors of a local school district may petition a state agency to conduct an audit of the school district's affairs. This audit is usually mandatory if the requisite number of signatures is obtained.

The statutes of a number of the states describe in some detail the scope and procedures to be undertaken by the audit of school district accounts. An example of a reasonably strict provision for audit is found in the Iowa statutes which refer to the duties of the State Auditor's Office in the examination of the accounts of various departments at the state level and provide that:

The Auditor of State shall make or cause to be made and filed and kept in his office written reports of all audits and examinations, which reports shall set out in detail the following:

1. The actual condition of such department found to exist on every examination.
2. Whether, in his opinion,
 - a. All funds have been expended for the purpose for which appropriated.
 - b. The department so audited and examined is efficiently conducted, and if the maximum results for the money expended are obtained.
 - c. The work of the department so audited or examined needlessly conflicts with or duplicates the work done by other departments.

3. All illegal or unbusinesslike practices.
4. Any recommendations for greater simplicity, accuracy, efficiency, or economy in the operation of the business of the several departments and institutions.
5. Comparisons of prices paid and terms obtained by the various departments for goods and services of like character and reasons for differences therein, if any.
6. Any other information which, in his judgment, may be of value to him. All such reports shall be filed and kept in his office.²¹

The authority given to the Auditor of State by this section is also delegated by reference to the auditors of school district accounts under the provisions of another section of the Iowa Code.²²

Auditors become concerned with the nature of school district expenditures when they must determine whether a given expenditure has been for a public as distinguished from a private purpose. Afterward they must decide whether there has been a budgetary appropriation to which the expenditure might be charged and whether there is a sufficient balance in the account to pay it.

The question of whether expenditures are for public or private purposes has been raised frequently.²³ The same question might be raised in connection with school expenditures, but where issues regarding the legality of school expenditures are concerned, these are more often appealed to the court on the theory that there is no statutory authority for making them.²⁴ More recently questions regarding such expenditures as for band and athletic uniforms, dues in school board associations, and for travel of school board members have been raised, but more frequently ruled upon by auditors, attorneys general, or other officials.

²¹Iowa Code Annotated, Sec. 11.4, "Report of Audits." The history of this and related Iowa statutes gives credence to the theory that present post-auditing practices developed historically from similar actions by pre-auditors.

²²Iowa Code Annotated, Sec. 11.19, "Examiner's Powers and Duties."

²³Viz., the Frohmiller cases, supra, p. 52.

²⁴Robert L. Drury (Ed.), Law and the School Superintendent, Cincinnati: the W. H. Anderson Company, 1958, pp. 204-207.

Rulings on questions such as these may, if allowed to stand unchallenged, come under the rule of "contemporaneous construction."²⁵ Thus, the question of whether the school board, the auditor, or some other public official makes the determinations as to how a new matter is to be handled becomes an important one. If a ruling is adverse to good school practice, a timely appeal may protect sound education practice or at least clarify uncertainties.

The second matter with which the auditor is concerned is the question of whether an appropriation is available from which to make a given expenditure. This may mean, "Is there money in the treasury to pay the bill?" It is much more likely to mean, "Has this particular expenditure been authorized by a budgetary appropriation, and can the proposed expenditure properly be classified within the budgetary appropriation which has been made?" This raises questions as to the character of a school district budget, the design of the school accounting system and the regulations under which school accounting is to be done.

The steps through which budgets are determined and the legal significance of the various budgetary requirements are to be discussed subsequently in more detail, but it is important here to note the different categories under which the school district budgets in the various states may be classified. A list may be made of these various alternatives.

1. No budget may be required. A simple appropriation of the total amount may be adopted.
2. A budget may be required, and the form may be stipulated by statute or regulation, but the budget itself may be created only for the purpose of estimating probable expenditures and may have no legal effect upon the action of the school board whatever.
3. The budget appropriation may be adopted as a total figure. This means that the school board is obligated to keep its expenditures beneath the total prescribed in the budget, but that funds can be manipulated by the board and expended for any particular legal purpose within the budgetary totals.

²⁵State Board of Land Commissioners v. Riris, supra, p. 54; State v. U Drive It Car Co., La. App., 79 So. 2d 590 (1955).

4. A budget may be a category budget. This implies that the expenditures may be classified into perhaps seven, eight, ten, sixteen, or some other number of categories and funds may be manipulated by the school board within these categories, but they cannot be transferred from one category to another. (Some statutes permit transfer under specified restrictions.)
5. A budget may be a "line budget." This implies that every expenditure must be made within the precise item where the appropriation was made and no funds can be transferred from one item to another.
6. A budget may be a "fund budget." A fund budget may be classified and administered under procedures described in Items 3, 4, or 5 above but the earmarked funds were raised for particular purposes and must be spent for those purposes. Money cannot be transferred from the library fund, for example, to the general operating fund, or from the school teachers' fund to the fund for school construction. Most budgets fall under this restriction.

Auditors are likely to evaluate the propriety of a proposed expenditure by determining whether it can properly be credited to a given budget category or budget line item where there are funds available to pay it. In line budgets, the question may be raised as to whether the proposed item itself was actually included in the budgetary request. This means that (under line budget restrictions) if a drill press is to be bought for vocational agriculture, the auditor may inquire whether a drill press was scheduled in the budgetary request or whether there was only a total amount scheduled. In the latter case, the auditor may rule that since no drill press was specified, the public expenditure for a drill press cannot be approved.

The question of "category" versus "line" budgets is really one of the degree of itemization demanded in school district budgets. Most accounting systems classify school district expenditures for current purposes under a list of six to sixteen major categories. These categories may be subdivided into as many as several hundred "line" accounts. A question then may arise as to the freedom which a school board may have in transferring funds from one account to another when, in their judgment, this may be to the advantage of the school district as the administration of the budget progresses through the school year.

The matter is subject to control by statute and where the statutory language is clear, it is mandatory. Where the statutory language is not precise, recourse may be taken to the courts. One such case arose in Arizona where the complete form for school district budgets is printed in the statutes. This form provides for six major categories with forty-one sub-items distributed under them. The question was raised as to whether funds could be transferred from one of the budgetary sub-items to another within the six major divisions of the budget. In deciding the case, the court ruled on the basis of what appeared to be the "rule of reason."

It appears to us that to bind either the school district or the superintendent to a forty-one line operating expense budget. . . would be impractical, unduly restrictive, and lead to absurd results. We, therefore, hold that the word "purpose" as used in the above sections has reference as far as the "Operating Expense" division of the budget is concerned to the six general categories rather than to the forty-one sub-items contained herein.²⁶

A similar conclusion was reached in an older Utah case.²⁷ Both cases are illustrative of the judicial attitude on freedom which may reasonably be granted to school officials in complying with accounting regulations.

In addition to the question which has already been implied as to the independence of a school board in transferring items from one budgetary account to another, there is also a continuing question as to the identification of the budgetary account to which a given expenditure ought properly to be charged. Are drill bits, for example, supplies or equipment? Should a replacement typewriter be charged to maintenance or to capital expenditures? Should expenditures for rental of sound films be charged to instruction or to library accounts?

These are "coding questions." They originate in the design of the accounting system, and particularly in the details of the regulations which govern the accounting system. These questions arise at two levels. First, with

²⁶Insley and Dick v. School District, 81 Ariz. 280, 305 P. 2d 432 (1956).

²⁷Tuttle v. Board of Education of Salt Lake City, 77 Utah 270, 294 P. 294 (1930).

respect to the "funds" within which school district money is classified. Second, in relation to the categories and lines of ordinary budgets such as those which have just been discussed.

It appears that the usual standard classification in which expenditures are actually related to the purpose for which the taxes were raised is acceptable, but school boards will not be permitted to classify expenditures arbitrarily and thereby escape the effect of tax limitation laws or other standing regulations. This issue was raised in an Illinois case where a school board arbitrarily classified ordinary school expenses under a capital fund account in order to evade the tax ceilings applicable to the levies for current school expenditures. This action was voided by the Illinois Supreme Court which said,

The Board of Education has levied its maximum rate for educational purposes and, notwithstanding this fact, attempts to charge to other funds expenses which are, without question, educational purposes, the result being not only that the appropriations are illegally charged to the wrong funds but that the error, if corrected by charging the appropriations to the educational fund, would increase the levy for the educational fund beyond the maximum of \$52,000,000.00 permitted by law.²⁸

Summary

The intergovernmental activity described in the present chapter may have either service or control effects upon school operation. Where the service of a non-school treasurer or auditor is made available to school by some other governmental agency, the effects are likely to be valuable. Where the actions result in restraint, the effects may be either beneficial or detrimental. They may help or hinder the educational program. They may save or cost money. Whatever else, the checks they impose do reduce the independence of school district officers and consequently diminish their accountability for their official conduct.

²⁸People ex rel Schlager v. Reilly Tar and Chemical Corporation, 389 Ill. 434, 59 N.E. 2d 843 (1945).

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CHAPTER IV

THE RESTRAINT OF SCHOOL EXPENDITURES

Of all the restraints exercised by non-education governmental agencies upon the administration of schools, those which apply to the expenditure of school district money are the most vigorous. They are also the most widely discussed in educational literature. They have had particular interest to students of financial administration since they affect both the amount and to some extent the character of educational expenditures. The present chapter is designed to review particularly the legal provisions upon which the restraints are based, to outline the theoretical considerations which prompt the use of restraints, and to discuss their effects upon current school operation.

Present practice in the restraint of expenditures was derived historically rather than theoretically, although it may be surmised that theory has sometimes produced innovations now regarded as of historic origin. Some particular activities of restraint are of long standing. Others have developed piecemeal or have been modified piecemeal as experience has been gained. For the most part, the restraints have been exercised through action on school district budgets, on tax levies, or on the creation of school district debt.

Restraints on School Budgets

The budget as a device for the orderly administration of government in this country is a product of the twentieth century. The first budgets were developed in Europe, primarily in Great Britain, early in the nineteenth century. But the use of budgets made little progress in the United States until shortly after 1900.

The development of budgeting practice in the public schools lagged considerably behind that of many of the political agencies of government.

While some standardization of accounting practice had been developed largely through the studies of the United States Office of Education and related groups about 1910, John W. Twente's Budgetary Procedures for a Local School System, published in 1923, indicated that budgetary practices in schools were still largely undeveloped.¹

A great deal of emphasis was placed upon the improvement of school administration during the 1920's and 1930's. Financial administration received particular attention. Writers on financial administration of schools gave important consideration to the question of fiscal independence versus fiscal dependence for school boards. The present study also considers this question as well as questions arising in other types of fiscal restraints imposed upon school officials.

It might be interesting to speculate on the various reasons, historical or otherwise, for the development of joint control of school district budgetary policy as exercised by school boards and other governmental agencies. The fact that municipalities had in many cases developed budgetary procedures earlier than public schools may have had some persuasive effect. However, Frasier reports an earlier study by Frank Rollins published in 1902 in which Rollins states that fourteen of twenty-four major city school systems were fiscally dependent as early as the date of the Rollins Report.² This would seem to indicate that fiscal dependence did not result entirely from the slow development of budgetary procedures among school districts.

Another theory holds that fiscal dependency is a check imposed upon appointed as distinguished from elected school boards. The theory is that since there is no popular control of appointed school boards by the electorate at large, some provision must be made for a check against fiscal indiscretions. The point is sometimes made as well that appointed school boards are in a sense creatures of whatever mayor or city council appointed them, and that there is a certain logic for requiring the school board to submit its financial

¹John W. Twente, Budgetary Procedure for a Local School System, Montpelier, Vt.: Capitol City Press, 1922.

²George W. Frasier, Control of City School Finances, p. 34.

plane for the approval of the municipal authority which is ultimately responsible for its action. Some greater tendency for appointed school boards to be fiscally dependent was reported in Fiscal Authority of School Boards in 1950.³

But beyond this speculation, immediate values appear to lie in the direction of analyzing the advantages sought by the budgeting process generally, and by the various checks which have been imposed upon school board autonomy in budgetary matters.

It would appear that budgetary procedures have the following objectives--at least upon occasion they are used for the following purposes.

1. To require a systematic analysis of projected school activities and their statement in terms of financial requirements.
2. To control the objectives and process of education.
3. To "spread the record" of school district intentions.
4. To control the total amount of the budget.
5. To discourage graft and the multiple possibilities for waste.

The related matters of the levy of taxes and the administration of school district debt are given separate consideration in the present chapter.

The Budgetary Process

The expenditure of public funds for school purposes involves at least a two step process. First, an educational plan must be considered and adopted which requires the expenditure of funds. Second, appropriations must be enacted which authorize the expenditure of funds to carry out the educational program.

The school board normally has responsibility for making the budget proposal. In a school system having an administrative head, the administrator

³National Education Association, (Research Division) Fiscal Authority of School Boards, April, 1950, pp. 54-55.

and his staff may do much of the actual work of preparing the proposal. The superintendent of schools may be designated by law to make the proposals in certain categories of school districts as he is in the county unit states of West Virginia and Florida. Except in such cases the school board is ordinarily the agency which makes budgetary proposals and the superintendent or other administrative head of the local school system has no independent power to recommend particular budgetary amounts.⁴

Subsequent to the preparation of a proposed budget, the statutes commonly (but not universally) require the school board to advertise the proposed budget by publication or by making it available for inspection at stated locations. Subsequently a budget hearing may be required. A hearing is both a device to "spread the record" and give citizens a chance to express their points of view on the proposed school program and the appropriations for it.

While exceptions are provided by statute for individual school districts and for classes of school districts in many of the states, procedures for the adoption of budgets follow certain well defined patterns. Inter-governmental restraint on the adoption of budgets is absent from some of them. The impact of others may be more clearly seen if the principal patterns for budget adoption are considered individually.

1. The budget may be authorized by an annual assembly of the school district voters. This type of action involves the whole corporate school district. It originated in New England where the budget was considered in a town meeting called particularly for this purpose or where it was considered with other matters in a town meeting called for general purposes. This procedure was at one time widely used in a great number of the states and is still found in a number of them--particularly in common and rural school districts.

⁴In Hawaii, the state budget for school operation is prepared by the State Department of Education. Budgets for local expenditures in the individual counties are prepared by county school administrative staffs, approved by the School Affairs Committee for the county, and submitted to the county boards of supervisors for final approval. Necessary legislative action follows.

The budgetary procedure in this case requires an advertising of a district meeting called for the consideration of the budget. Typically, the school board makes a budgetary proposal. This is subjected to debate and the total amount of the budget may be either increased or decreased by the action of the meeting. Individual items in the proposed budget may usually be increased, reduced, or eliminated.

2. The budget may be proposed and adopted by the school board acting independently in a representative capacity for the school district. This is a common method. Under an alternative procedure, the budget may be proposed by the local school superintendent and be considered and adopted by the school board. In either of these cases, there may be a requirement for advertising the budget and conducting a budget hearing. Citizens usually have the right to appear and present their views at such a budget hearing, but the school board may use its own discretion in adopting budgetary appropriations. The board is not, in the absence of contrary statutory provisions, required to accept or follow the recommendations and requests made to them at the budget hearing.

3. The budget may be adopted by the school board, but later be subject to approval by some local non-educational agency or official. This is "fiscal dependency" for a school board.

After school board action has been taken, municipal councils or similar county agencies may be granted power to approve school district budgets--especially if either of these agencies is required to provide funds for the support of the school district budget. In other cases, some special local board or commission may be established by law to review school district budgets.

The power of a city council, a board of county commissioners or other local agency to review, modify, approve or reject a school district budget, originates in the statutes and does not exist in the absence of statutory provisions.⁵ While contrary judicial opinions can be found under the

⁵Provisions of home rule charter which are applicable to this question are not here considered.

terms of individual statutes, the bulk of the decisions support a general rule that the authority of a city council or board of county commissioners to modify or approve the school district budget is limited to action on the total amount of the budget. Discretion as to how the funds appropriated by the budget are to be spent is a prerogative of the school board.⁶

The board of education may be required by action of a reviewing agency under statute to comply with the itemized amounts approved in the school budget.⁷ However, a number of the court opinions which have limited the municipality's power over school budgets to the determination of total amounts have said also that, while the itemization must be included for the information of the municipal agency in determining the amount of the budget, any action by the municipal agency in relation to individual budget items is advisory only. The school board should consider it but need not be bound by it. Thus, in a Virginia case the court said,

I am of the opinion that the board of supervisors has the right, within the limits prescribed by law, in their discretion, to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit, but they are concerned only with the total amount of the tax to be levied, and not with the individual items of the school budget, except in so far as it helps them to determine the total amount of the tax to be levied. After the board of supervisors have appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as they stay within the limits set up in the budget.⁸

⁶Fleishmann v. Graves, 235 N.Y. 77, 138 N.E. 743 (1923); Brennan v. Board of Education, 245 N.Y. 8, 156 N.E. 78 (1927); Board of Education v. Dibble, 240 N.Y.S. 422, 136 Misc. 171 (1930); Board of Education v. King, 114 N.Y.S. 2d 329, 280 App. Div. 438 (1952); Board of Education of the Town of Stamford v. Board of Finance, 127 Conn. 345, 16 A. 2d 601 (1941); Bailey v. Duffy, 45 R.I. 304, 121 A. 129 (1923); Leonard v. School Committee, 241 Mass. 325, 135 N.E. 459 (1922); Board of Supervisors v. County School Board, 182 Va. 266, 28 S.E. 2d 698 (1944). Under terms of City Charter-City of Franklin v. Hinds, 101 N.H. 344, 143 A. 2d 111 (1958).

⁷Board of Education (Prince George's County) v. County Commissioners, 131 Md. 658, 102 A. 1007 (1917).

⁸Board of Supervisors v. County School Board, 182 Va. 266, 28 S.E. 2d 698 (1944).

The discretion of municipal authorities in the approval of local school budgets may be further circumscribed by statute. Thus, there are frequent rulings under the statutes of some of the New England states that municipal authorities must appropriate funds necessary to operate mandatory school services, but that they may use their discretion with respect to budgetary requests for services which are not required by statute or intrusted to the discretion of school boards. In a Connecticut case, the court endorsed this general rule and then said,

Where the expenditure is for a purpose which the statutes make it a duty of the board of education to effectuate or they vest in the board of education a discretion to be independently exercised as to the carrying out of some purpose, the town board of finance has not the power to refuse to include any appropriation for it in the budget it submits and can reduce the estimate submitted by the board of education only when that estimate exceeds the amount reasonably necessary for the accomplishment of the purpose, taking into consideration along with the educational needs of the town, its financial condition and the other expenditures it must make.⁹

An alternative pattern of local budgetary approval requires action by an agency appointed for the purpose of passing on school district budgets. Examples from three states are described.

There are two general plans for the approval of school district budgets in New Jersey. "Chapter 6" school districts are identified with a municipality. The board of education of these districts prepares a budget estimate which is submitted to a "Board of School Estimate" for consideration and approval. This board is composed of two members of the board of education, two others appointed by the mayor, and the mayor himself. Since the members of the board of education are also appointed by the mayor, the budget finally approved is likely to be identified closely with the municipal budget.

School officials in "Chapter 7" (formerly rural) districts prepare a proposed budget which is submitted to the voters in a local referendum. If the voters approve, the budget is authorized. If the referendum fails, a

⁹Board of Education of the Town of Stamford v. Board of Finance, supra.

second proposal is made and submitted to a second referendum. If this fails, the school board consults with the governing board of any city or village in the district. If an agreement is reached during this consultation, a tax levy is authorized based upon the agreed budget. If the district board takes no action or there is no agreement, the entire matter is referred to the State Commissioner of Education who reviews both the proposal and the supporting evidence and certifies a levy to the County Board of Taxation. This procedure makes it possible for a given local community or its leaders to escape political responsibility for the amount of a tax levy. In a few districts in New Jersey there is a history of levies certified by the State Commissioner of Education in this way year after year.

In Indiana, school district budgets must be submitted to a County Board of Tax Adjustment for approval. This board is composed of one member of the County Board of Supervisors, one official representing the largest municipality in the county, one from the school board of the largest school district in the county, and four others appointed by the judge of the circuit court of the county. The Board of Tax Adjustment reviews the budget proposals from all agencies authorized to levy taxes. It may reduce proposed budget totals but cannot increase them. Neither can it adjust individual items in the proposed budget. If the budget approved by the Board of Tax Adjustment is satisfactory to the school district, this approval is final.

If the school district is not satisfied with the budget as approved, the budget may be referred to the Indiana State Tax Commission. This body maintains a staff trained to analyze budget proposals and to conduct budget hearings. They hold hearings in the respective counties. They may increase or reduce individual budget items or the total amount of a budget. In practice the authority to change budget items is freely exercised and may have a significant effect upon the educational program of a school district for the year covered by the budget.

North Dakota statutes provide for a seven member Board of Budget Review composed of two members each from the local school board, from the governing body of the local municipality, from the public at large, and one additional member from the local park board (or an additional member representing the public at large.) This body reviews all local budgets--

including that of school districts which contain a municipality within their borders. Individual items in budgets may be reduced but not increased.

Any of these local review procedures may tend to hold down school expenditures. However, one additional purpose appears to be to coordinate all plans for local spending.

4. A budget adopted locally may later be subject to approval by the state education agency or by some other state agency. This procedure makes possible a considerable degree of coordination between local budget plans and state plans for the financial support of local schools. It also makes possible the general supervision of fiscal administration in local districts. In the state of Nevada, for example, the state education agency has a field staff that works with local school districts in both the preparation and administration of their budgets throughout the school year. The education agency in North Carolina approves local budgets after check to be sure that the budget will be adequate to finance the educational plan, and that the proper legal steps have been taken in adopting the budget.

Other purposes may be served where state approval of local budgets is made by a non-educational agency. Some of these check only for compliance with legal requirements. This is the only matter checked by the Nevada Tax Commission. In other states (notably New Mexico and Louisiana), state agencies may require a revision of budget figures before approval is given.

Supervisory features are found in the plans for approval of local school district budgets by state non-school agencies in certain states. The West Virginia State Board of Finance must approve local (county school district) budgets. The statutes provide that these local budgets must be approved providing (1) they are fiscally sound, (2) they provide for a standard school term, and (3) they comply with the regulations governing school budget construction.

Whatever may be the legal stipulations, financial and educational advice is commonly available from state agencies to local districts in connection with that share of budget administration for which state agencies are responsible.

5. Approval of local school district budgets by some combination of the listed methods may be required. Upon occasion, approval by more than one agency may be required. Certain examples of participation in budget development and approval by more than one agency have already been cited in the preceding discussion. One agency may check or approve the budget for one purpose; another agency for a different purpose. The ultimate purpose is to recognize and protect all of the interests which are involved in the administration of local school district finances.

The Restraint of Tax Levies

The levy of taxes to provide the funds for the financial support of school might be thought to be a routine matter once the local school district budgets have been adopted. This is often but not always the case. The levy of taxes may regularly be a mechanical or ministerial task which is carried out by some board or official. The amount to be raised by taxation is divided by the assessed valuation of the school district and an ad valorem tax rate is thus established. There may be some routine checks to insure that the resulting levy falls within statutory or voted tax rate ceilings. This check has, indeed, sometimes been reported in educational literature as an act creating fiscal dependency, although in fact no discretion is involved and no additional influence can be exerted on a school district's financial policy by the checking procedure.

Formal approval of tax levies may be directly related to approval of the budget or action on a tax levy may be independent of the approval of the budget. Sometimes separate action on the budget and on the tax levy is taken by the same individual or agency. A story is told of a politician in one state who liked to brag to parent-teacher groups that he had "Never voted to cut a school budget," but his action on tax levies was such that he could assert to taxpayer groups that "I have never voted for a tax increase." This story, possibly apocryphal, nonetheless illustrates the possible effects of separate action by budget-approving and tax levy-approving agencies upon financial administration.

The independence of a board of education in administering the school district tax levies is checked in a number of ways. In a number of states the

legal voters establish a tax ceiling through a referendum. The school board then has some freedom to budget under this tax ceiling. Failure of a tax referendum may (1) void all taxing power; (2) continue previous ceilings, or (3) reduce the tax ceiling to a previously established statutory figure.

Another important pattern of limitation provides an overall tax ceiling for a unit such as a county for the combined tax rate of all tax levying governmental units. Beyond any statutory commitments, a tax review board of some sort must allocate the tax levies among the school districts, municipalities, townships, county and any special districts that may be entitled to a share of the total levy authorized. The school district (as well as all other governmental units) must adjust its budget accordingly.

Litigation regarding the levy of taxes has not involved inter-governmental relations in relation to schools to any considerable extent. Upon occasion questions have been raised regarding the authority of levying officials but these involve the interpretation of individual statutes.

Litigation has also been prosecuted where the city or other local governmental agency not only levies taxes but also collects them. Questions as to the custody of collected taxes, the right of the collecting agency to exact a fee for tax collection and the investment of idle tax funds prior to their delivery to the school district have all been litigated from time to time. These questions also involve the interpretation of the statutes of individual states.

The Restraint of Temporary Loans

School districts have frequent need to incur debt obligations. Loans for short periods (typically less than two years) may be needed in ordinary school operation. These may be secured through such devices as registered warrants, tax anticipation warrants, and short-term loans from banks. Long-term debt obligations (typically for capital expenditures) are usually found in the form of general obligation bonds, although other forms of long-term obligations are authorized in a number of states.

In the ordinary operation of a school district's financial business, there are times when cash balances are not available for the day-to-day operation of schools. Such periods of stringency may result from an inconvenient tax calendar or from the slow collection of taxes. They may also result when there is unexpected damage to school property or unanticipated increases in school enrollment.

Most of the states have made legal provisions for local school districts to obtain temporary loans to operate under such periods of financial stress. These provisions usually fall within one of four classes.

1. "Tax advances" may be requested and obtained from tax collecting agencies or from emergency funds.
2. The school district may be authorized to borrow money on a note from local banks or other lending agencies.
3. Regular school district warrants may be "registered" and later paid in the order of their registration as funds become available.
4. "Tax anticipation warrants" may be issued and sold. These are secured by taxes which have already been levied and must be repaid from the proceeds of these taxes.¹⁰

These debt-incurring authorizations are often subject to statutory limitations. Statutes may provide, for example, that loans be made only up to a certain percentage of the taxes levied or "not in excess of the current year's budget." Loans are often required to be paid within one year or within the current fiscal year. In a few of the states there are authorizations for current short-term obligations to be carried over into the following year or to be included in the budget for the following year and retired through a special tax levy.

There are special provisions for temporary loans in a considerable number of the states. The Alaska statutes are silent on the subject of power to incur indebtedness, but in practice some Alaska school districts have been

¹⁰Anticipation notes are also used in some states to obtain funds to proceed with capital expenditures (1) after bonds have been authorized by election or otherwise, and (2) before the bonds are sold.

able to obtain temporary loans from local lending institutions and then to repay them from school district revenues when these have been received. There is no provision for school district loans in either Connecticut or Rhode Island where funds are provided for school districts by the municipal government. If loans must be made, the municipal governments make the loans and deliver the funds to the school district. The districts in these states do not have debt-incurring capacity.

In a number of other states, school authorities must obtain approval of local agencies in order to make temporary loans. This procedure is usually required in states where local school district budgets must also be approved by some local non-educational agency. In such cases, loan approval must usually be obtained from the same agency which had authority to approve the school district budget.

A few states require approval by the state education agency--at least for certain types of loans. A few others require that the temporary loans be authorized by a local referendum.

While there are few statutory references to the matter, it appears that school districts in some of the states have authority to create debt through lease-purchase contracts. There is a statutory provision in the state of Michigan that these require approval of the state education agency (1) if the terms of the contract extend for more than two years and (2) unless the contract is for the purchase of school buses. Similarly, contracts for the purchase of buses may be made for as long as five years in Mississippi, but these also require approval of the state education agency.

While there has been a great deal of litigation regarding the temporary loans of school districts, little of it has been concerned with the question of intergovernmental relations in making the loans. Statutory provisions are regarded as mandatory and little uncertainty has existed regarding them.

The Restraint of Long-Term Debt Obligations

School districts use long-term debt obligations for limited purposes. The major purpose is to provide school plants--to acquire school sites and to construct and equip new school buildings. In scattered instances, long-term debt has been used to fund other miscellaneous debts already contracted, to create an operating cash balance for the school district, or to purchase major items of equipment such as school buses. Long-term debt is usually in the form of general obligation bonds. Lease-rental agreements are used in about a half a dozen states. State educational and fiscal agencies and various local non-school agencies exercise important influence on local school debt administration in a number of states.

General Obligation Bonds

Discussions of the legal questions surrounding school bonds must be undertaken with clear recognition of their limitations. In the first place, all of the states have some kind of provision for the use of long-term debt obligations to finance schools. These are the provisions commonly reported, and valuable generalizations can be made regarding them if it is understood that the discussion is concerned with "a" bond procedure for a given state and not "the" bond procedure for that state.

In a number of the states, bonds may be issued under procedures stipulated for school districts; in some of them they may also be issued under one or another procedures established for "municipal corporations." School districts may or may not be included within the category of municipal corporations under the terms of a particular act. Bonds may at one time have been issued under terms of statutes which are no longer operative--that is, the statute may still be on the books but the conditions which may at one time have authorized the bond issues may no longer exist. Moreover, authority to issue bonds under certain prescribed procedures may have been permissive in character and applicable only to one or a few school districts. Acts of this kind are commonly omitted from the compilation of statutes in the "non-code" states.

The most commonly used procedure for the issuance of general obligation bonds by a school district includes three steps.

1. A formal proposal for a bond issue as authorized by law.
2. Official action to authorize the bonds.
3. Certain stipulated steps (which vary from one authorized procedure to another) for the sale and issuance of bonds.

These procedures are usually detailed by statute, although the language of statutes has sometimes required judicial interpretation. Statutory procedures are ordinarily regarded as mandatory and the legality of a particular bond issue is usually held to depend on compliance with statutory provisions.¹¹

The Proposal

Bond proposals usually originate in one of two ways: (1) by resolution of the local school board; or (2) by a petition signed by a stipulated number of residents legally entitled to vote on the bond proposal. Where bonds for school construction are actually issued by the municipal government, statutes may provide that bond proposals be initiated by a resolution of a city council or similar municipal authority. Even in these cases a petition of voters or a resolution of the school board may be required to initiate the issue.

Authorization

Bonds are usually authorized (1) by a resolution of the board of education (usually after notice that a proposed issue is under consideration and after a public hearing), or (2) by a referendum conducted in the local district at which voters with stipulated qualifications are given an opportunity to approve or disapprove the proposed issue. Almost all of the states have authorized "a" procedure for some school districts for issuing bonds which employs a local referendum.

¹¹"Strict compliance" with the statute is the rule, but "substantial compliance" has been approved by the courts from time to time under conditions where it is clear that the rights of taxpayers have not been infringed, the legislative intent has been accomplished, and public approval for the action has clearly been expressed. As pointed out in the text, some statutory bond procedures have also been held to be directory rather than mandatory under certain circumstances.

Under an alternative procedure, bonds may be authorized by a resolution of the board of education under statutory terms which are likely to provide for an advertisement of the proposal and an open hearing prior to the adoption of the proposal.¹² Where this procedure is authorized, a ceiling on the amount of bonds which may be issued in this way is sometimes imposed.¹³

There are additional procedures for authorizing school bonds in a number of states. For example, in the state-operated school system of Hawaii, bonds are issued by a state agency after action by the legislature. Legislative authorization is also required in Maryland under constitutional provisions.¹⁴

Sale and Issue

After bonds have been authorized, there are formal procedures to print and issue the bonds, offer them for sale, and deliver them to the purchaser. These procedures have a number of purposes. They are undertaken to protect the property rights of both the school district as the issuing corporation and of the purchasers. Other related purposes are to establish fair and reasonable interest rates (through bid procedures), to see that the recitals on the face of the bonds actually describe the agreement reached, and similar matters. They provide a final check that all legal stipulations have been complied with. Upon occasion they may be designed to provide an additional check on the discretion exercised in authorizing and issuing the bonds.

¹²Procedures of this kind are also authorized at times under special or emergency conditions such as the destruction of school buildings by fire, earthquake, or windstorm. Approval by some other official or agency may be required in such cases.

¹³Most of the states have some stated ceiling on the amount of school district bond issues--usually expressed as a percentage of the assessed valuation of the district. Some of these limits are established by the state constitution; others by statute. In a number of the states, action of the electors in a referendum or approval by the legislature or some other governmental agency may make it possible to raise the bond ceilings--at least to a stipulated second limit.

¹⁴Supra, p. 25.

Restraint and Approval

Provisions for a review of school district action on a proposed issue of school bonds by some non-educational government agency is frequently made by statute. This review (and approval if approval is required) may be stipulated for any step in the bonding procedure. It may be performed by either a local or state official or agency. The reviewing action may be advisory and not binding on local school district officials; it may be ministerial--concerned with a verification of the legality of the procedures which have been undertaken, or it may be mandatory. Mandatory action in effect makes the reviewing agency a kind of a "super school board" whose discretion may be substituted for that of local school district authorities.

School bonds are most commonly authorized at the local level by the approval of a bond proposal in a local referendum as has already been pointed out. Where this procedure is used, no further local approval is usually required. Some local agency or official may be required to certify the results of the election, the bonding capacity of the district, or similar matters as a ministerial act, but this type of action seldom involves the use of any discretion or power of any sort to modify school district action.

The authority of boards of education to execute the bonds and utilize their proceeds is subject to control by statute. Ordinarily, the board has some discretion with respect to the date of issuing the bonds, the amount of bonds to be issued at one time (within the total approved), and similar matters. But under the terms of particular statutes it has been held that although a board may delay a bond issue to an appropriate time, it may not fail or refuse to issue bonds authorized and thus defeat the will of the electors.¹⁵

Approval of school district bond proposals by local non-educational agencies appears sometimes to be a substitute for the bond referendum more commonly required. Thus in New Jersey, bonds may be issued by a resolution of the board of education in Chapter VI (municipal) school districts if the amount of the bonds does not exceed a statutory limit. No referendum is required

¹⁵Durgin v. Brown, 37 N.J. 189, 180 A. 2d 136 (1962).

under this procedure. The statute provides that after the board of education has authorized the bond issue,

The Board of School Estimate shall fix and determine the amount necessary for the purpose or purposes enumerated (for the proposed bond issue) and shall make a certificate of such amount which shall be signed by a majority of all the members of the Board of Estimate.¹⁶

The apparent intent of this statute is to substitute the action by the Board of School Estimates for the referendum required to issue bonds under other procedures as a governmental check on the discretionary action of the board of education in authorizing the bond issue.

A different (but very real) pattern of restraint is found where long-term debt obligations are contracted by city councils or equivalent county authorities for certain school districts as they are in a number of states. Where (as under certain bond procedures in Connecticut and Rhode Island) the municipality must authorize the bond issue through a referendum or a town meeting, the effect is substantially the same as if this action were taken by the district itself. The question of inter-agency control is also unimportant in states where bonds are issued for some school districts under legislation which makes this action mandatory on the request of the school district as in the state of Kentucky.¹⁷ But city councils or similar county agencies appear to have considerable discretion in determining whether or under what terms the council will issue bonds in certain categories of school districts in Delaware (Wilmington), Indiana, Wisconsin, and others.

The range of discretion permitted local non-school authorities in the issue of school bonds has been examined in some detail by the courts of Tennessee. In that state, the County Quarterly Court issues bonds for local school districts in the county. The Tennessee courts have permitted the Quarterly Court to classify bonds and dedicate them to specific purposes. Thus bonds were issued on behalf of one district which was also taxed to repay the

¹⁶New Jersey Statutes, Section 18:7-118.

¹⁷Stokley v. Fleming County Board of Education, 305 Ky. 602, 205 S.W. 2d 168 (1947); City of Paducah v. Board of Education, 289 Ky. 284, 158 S.W. 2d 615 (1942); Hopkins County Fiscal Court v. Commonwealth, 252 S.W. 2d 875 (Ky., 1952).

bonds.¹⁸ In another case, the Court was permitted to issue bonds for the entire county but to divide the proceeds between a city and the county school district in the county on the basis of their average daily attendance.¹⁹

Another question arises in relation to the discretion of either the school district or of the non-educational agency to stipulate the types of bonds which may be issued. In the absence of statute or specifications in the bond election, the general rule has been that the issuing (not essentially the school) authority has the power to determine such matters as date of sale, length of term, denomination of bonds, and similar matters.²⁰ The discretion of the issuing authority must be exercised within the terms provided by statute and in accord with any provisions such as specifications for term or interest rates which may have been included on the election ballot.

An additional question arises as to the control of the bond proceeds after the bonds have been sold. Except for cases where the municipality actually constructs a school building and holds title to it, the general rule is that once the bonds have been issued, the funds must be transferred into the custody of the board of education and be spent under their discretion. Non-educational agencies are generally held not to have authority over the use of bond funds which will allow them to determine the choice of sites, design of the school building, construction methods or similar matters.²¹

Approval of bond issues by local non-educational agencies appears often to be a concession to specific local communities where conditions are not typical of the state as a whole. Provision for approval by local non-educational agencies may apply only to certain categories of districts, or at least apply differently to different categories of districts.

¹⁸Guffee v. Crockett, 209 Tenn. 121, 315, S.W. 2d 646 (1958).

¹⁹City of Elizabethton v. Boone, 205 Tenn. 617, 329 S.W. 2d 832 (1959).

²⁰Lang v. Harrison County, 114 Miss. 341, 75 So. 126 (1917); DuPont v. Mills, 39 Del. 42, 196 A. 168, 119 A.L.R. 174 (1937).

²¹Bandy v. State ex rel Board of Education, 186 Tenn. 11, 207 S.W. 2d 1011 (1948); Parker v. Anson County, 237 N.C. 78, 74 S.E. 2d 338 (1953); County School Board v. Farrar, 199 Va. 427, 100 S.E. 2d 26 (1957).

Where state approval is required, this appears to be an expression of legislative intent that local action must be subordinated to the interests of the state in the total administration of school district debt obligations. There are three general patterns of state approval which may be required. First, the state education agency may approve local issues. Second, some other non-educational state agency (usually from a fiscal department) may supervise or approve the issue; and third, some particular state official such as the attorney general may have power of approval.

The first two of these may be illustrated by the review of a single case in the state of New Jersey. In that state, bond proposals in which the total amounts exceed a statutory limit must be approved both by the Commissioner of Education and by the State Local Government Board (a subordinate agency in the New Jersey State Department of Taxation and Finance). The State Commissioner of Education must determine whether existing educational facilities are or within five years will be less than eighty per cent adequate, whether new educational facilities will be fully utilized within ten years, and whether under existing statutes there is no more economical way of providing for such new facilities.²²

The same statutory section provides that the Local Government Board is required to record by resolution its estimates that the amounts to be expended for the new facilities are not unreasonable or exorbitant, and that the financial condition of the district satisfies the requirements of statute. These provisions were attacked in the Schinck case as violative of the New Jersey Constitution forbidding delegation of legislative power. In upholding the constitutionality of the New Jersey statute, the court reasoned that New Jersey had properly chosen to delegate only the determination of the facts which authorized the action and said,

The Legislature in its wisdom decided to entrust this task to administrative agencies who possess the background and skill necessary to handle such problems with maximum facility and expertness. . . . None of these estimates is a matter of pure discretion with the two agencies involved. They involve passing upon conditions

²²Schinck v. Board of Education, 60 N.J. Super. 448, 159 A. 2d 396 (1960), quoting New Jersey Statutes Annotated, Sec. 18:5-86.

of fact in the light of expert administrative judgment. . . . The Local Government Board must be presumed to have a large degree of expert administrative knowledge concerning local financial affairs. It annually passes upon local budgets. It concerns itself constantly with the fiscal health of municipalities with temporary financing and with bond issues. . . . It is precisely because of the Board's wide knowledge of municipal affairs and its expertness that the Legislature chose to entrust the determination to be made under (the statute) to that specialized administrative body.²³

The statutes in some of the states are explicit with respect to the matters which the state education agency or other non-educational agencies at the state level are required to consider in reviewing and approving local bond issues. Others do not detail these matters. In either case, the customary practice is for the agencies to establish regulations governing the bond issues and to approve issues which satisfy the requirements specified. Bond proposals which are substantially different from those ordinarily made may be considered on their own individual merits, but in general proposals are handled under administrative regulations which have been regularly established.

A somewhat different situation is created when action must be taken by a particular state official such as the comptroller, auditor, or attorney general. In some instances, it appears that information regarding the bond issue is deposited with state fiscal agents in order to make the issue a matter of record and to facilitate any further administrative action which may need to be taken during the term of the bonds. Action by the attorney general, where required, is usually in the form of certification that the bonds are in proper form, that they are issued under statutory authority (with respect to ceilings and similar matters), and that the necessary procedural steps have been taken to establish the legality of the issue. Where the nature of action by the attorney general on these matters has not been specifically required by statute, this type of action has been upheld in the courts.²⁴

²³Schinck v. Board of Education, ibid.

²⁴Dependent School District v. Williamson, 325 P. 2d 1045 (Okla., 1958).

A question is frequently raised as to when approval by any of the state agencies must be made. Where the statutes provide for such approval, this is regarded as a mandatory action which must be observed in order to establish the legality of the issue. The terms of the statute may commonly indicate or be interpreted to mean that approval by the state agencies should be had before the bond election is held. However, the courts have consistently applied the same rule to this requirement that is commonly applied to other stipulations regarding elections. That is, if objection to a bond issue is made on this basis prior to an election, the courts will order the local officials to secure approval prior to the election. But if the statutes are silent as to when the approval must be secured or if no objection is raised until after the election, the courts then reason that the stipulation becomes directory, and state approval may be secured at any time prior to the issue of the bonds.²⁵

Lease-Rental Agreements

In states in which local school districts are authorized to use lease-rental agreements with school building holding corporations to secure school facilities, statutory precautions are usually stated to prevent the indiscriminate use of the holding corporation and the creation of unnecessary debt. Approval for a school plant project through the use of the holding corporation is commonly required to be made at some point in the procedure by some agency outside the school district.

Thus, the plan for constructing the building must be approved by the state educational agency in both Kentucky and Georgia before the local school district can proceed with the project. However, it has been held in Kentucky that once this approval has been received, the request from the school district to the local city or county (which in Kentucky acts as the holding corporation) is regarded as mandatory and the city or county must issue the revenue bonds to construct the school building as requested.²⁶ Regulations provide somewhat different procedures in Indiana, Pennsylvania, and elsewhere, but all of them

²⁵White v. Curry County Board of Education, 36 N.M. 177, 10 P. 2d 590 (1932); Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P. 2d 1027 (1940); Robinson v. State, 82 Ga. App. 584, 61 S.E. 2d 773 (1950); Nordby v. Dolan, 78 N.W. 2d 689 (North Dakota, 1956).

²⁶Fyfe v. Hardin County Board of Education, 305 Ky. 589, 205 S.W. 2d 165 (1947); Ranier v. Board of Education, 273 S.W. 2d 577 (Ky. 1954).

are designed to protect the public interest in the control of local school district obligations created under provisions which are in addition to those ordinarily established for bonds.

Other Forms of Obligations

The usefulness of lease rental contracts lies in the legal technicality that under certain precise terms contracts can be drawn so that payments become debt obligations for only one year at a time. This helps districts avoid low debt ceilings.

Similarly, school district revenue bonds are used in a few instances to finance stadiums, dormitories, and other income producing buildings. These escape the classification of debt under constitutional terms since the income they produce is the only security for the bonds--the latter are not the general obligations of the school districts.

Long-term tax anticipation notes (used extensively for capital purposes only in Alabama) are not classified as debt under some state constitutions--they are merely assignments of taxes.

In some states, money is available for capital purposes to local districts through agreements with agencies administering state loan funds. Whether these agreements constitute debt is a matter dependent upon the terms of local statutes and constitutions.

But all of these are special provisions for securing capital funds. They can be secured only under the precise terms of statute. There has been some litigation to establish the meaning of local statutes, but there appears to be little question regarding inter-agency control. If the statutes provide for it (as they do for proposed issues of tax anticipation notes in Alabama), these directions are mandatory.

Summary

The question of the fiscal autonomy of local school agencies has received consideration for many years. From analysis of the governing legal

provisions it appears that complete fiscal autonomy for educational agencies exists infrequently. Even where budget autonomy exists, non-school agencies may require, restrain, or forbid school expenditures in significant amounts. Accounting regulations, audits, and the direct action of public officials may produce some of the same effects which in other areas are influenced by budgetary restrictions.

On the other hand, some "dependency" situations are less restrictive than sometimes casually thought. Some of the activities of non-educational agencies of government casually regarded as restraining may in fact be advisory only. Others may be ministerial in character and restricted to the enforcement of statutory requirements. Even where intergovernmental controls are most vigorous, the statutes often restrict the scope of non-educational controls and stipulate protection for the autonomy of school officials in matters not concerned with appropriations. Judicial decisions have usually limited controls exercised by non-educational agencies to those precisely authorized by statute.

CHAPTER V

THE REGULATION OF SCHOOL SITES

With the exception of fiscal affairs, the matter of selecting, securing, and using school sites and the various school buildings erected upon them is subject to greater legal restraint than are most other aspects of school operation. The acquisition and use of school sites and school plants involve major public expenditures. It is not surprising that the same extensive and binding restraints might be imposed on school boards in dealing with school plants that are imposed on the administration of school district financial matters.

Moreover, the location, design, construction and operation of schools and school buildings may affect public health and welfare and may be intimately related to other social interests in a given community. Questions of land use, of relationship between school plants and highways, of sanitation, of safety, and even of aesthetic harmony within a neighborhood are matters of public concern.

The present chapter deals primarily with restraints imposed on the selection, acquisition, and use of school sites by school boards, although some statutory provisions deal with both sites and buildings together and some of the present discussion may deal with both subjects.

Restraints relating to school plants are often imposed on one category of school districts in an individual state and not on another. The pattern of restraints may vary from one school district in the state to another or from one category of school districts to another. This may reflect the localist concept that legislation regarding the administration of school plants should permit the maximum autonomy for the local community which is consistent with the public interest.

On the other hand, much legislation relating to school plants is of a permissive character, designed to benefit a particular group of individuals or to grant special privileges to certain local communities under which they may deal with their peculiar problems. In other cases, legislation may be of an experimental character, applicable only to certain types of communities. Here, the legislation may be applied in a limited area so that experience can be gained to ascertain the effects of the legislation before extending it to communities generally.

This is not a sufficient explanation for all patterns of legislation. A considerable number of states impose a variety of restraints upon local school action which is exercised through various state agencies or officials. These should probably be regarded as manifestations of state concern for the subject matter included and possibly some intent to promote uniform treatment of the subject matter throughout the state. These provisions for state participation in community planning and local school plant planning tend to accumulate with the passage of time. They indicate, to some degree, a trend toward centralization of decision and responsibility in the administration of matters which were formerly regarded as chiefly of local concern.

The Acquisition of School Sites

School systems throughout the fifty states are authorized to obtain sites for school purposes. Power to do so is specifically conferred by statute in most of the states, but otherwise can be inferred from the school district's power to contract or as "one of the powers essential to accomplish the purposes of the corporation." Procedures for the acquisition of sites are often stipulated (especially when they must be secured by condemnation). Under the general rule of statutory construction, when procedures are stipulated they are regarded as mandatory and must be observed. Similarly, any limitations upon the powers in question are also regarded as mandatory and must be followed.

The Selection of the Site

The selection of the school site is generally regarded as a prerogative

of the board of education.¹ Even in those states where sites are procured for school districts by some other agency of government, the selection of the site has generally been held to be a function of the school board.²

The prerogative of site selection is reserved to school boards not only as distinguished from city or other local governments. It is also secure from interference by the courts in the absence of improper motives or manifest abuse of discretion. This rule was established by the Pennsylvania court as early as 1893 and has been consistently followed by the courts of other states. In this particular instance the Pennsylvania court said,

For an abuse of discretion or an act contrary to law, the remedy is the common pleas, but, for a mistake in judgment as to the time or manner of performance of their official duties, they (the school board) are answerable to the constituency that elects them. They must act. Their action must be within the legal limits that bound their powers. If they refuse to act or go beyond the fair exercise of their discretion the courts can exercise the control over them. If neither of these conditions exists, but they proceed to discharge their duties, exercising their official discretion as to the matter, the courts cannot interfere.³

The selection of school sites may be subject to approval by state agencies in certain instances. The State Educational Finance Commission must, for example, approve the purchase of sites in Mississippi; the State Board of Health in Indiana. State approval is required in Utah if state funds are to be used in paying for the school site. This requirement is also found in other

¹However, site selection may be a prerogative assumed by the legal voters in those states where voter approval of school building projects is required at school district meetings.

²Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43 (1916); Wilcox v. Burnam, 98 N.H. 64, 94 A. 2d 373 (1953).

³Roth v. Marshall, 158 Pa. 272, 27 A. 945 (1893); Brown v. Candler, 236 N.C. 576, 73 S.E. 2d 550 (1952); Pickler v. Board of Education, 149 N.C. 221, 62 S.E. 902 (1908); McInnish v. Board of Education, 187 N.C. 493, 122 S.E. 182 (1924); VanEs v. School District, 197 Iowa 348, 197 N.W. 55 (1924); Aikins v. McAden, 229 N.C. 752, 51 S.E. 2d 484 (1949); Feezor v. Siceloo, 232 N.C. 563, 61 S.E. 2d 714 (1950); Dube v. Peck, 22 R.I. 443, 48 A. 477 (1901); Murphy v. Duphy, 46 R.I. 210, 124 A. 103 (1924).

states--in some of them indirectly through the operation of other regulations. Thus, state approval may eventually be required where some state agency is required later to approve plans for the construction of school buildings.

Approval by local agencies may also be required where funds are furnished by municipal or other local governments. An example is found in the city of Baltimore, where title to school sites is retained by the city. Local approval is also required in city school districts in Alaska.

Eminent Domain

Once a proposed school site has been selected, the usual procedure for acquisition is by negotiation and contract. Where funds are available, the owner is willing to sell, and an acceptable price can be agreed upon, the local agency which has authority to purchase (whether school district, municipal government, or otherwise) may proceed with the execution of the contract. No specific approval of the contract itself is ordinarily required where clear title is to be vested and where the agency has authority to purchase.

If the owner of a piece of land wanted for a school site is reluctant to sell or if an agreement cannot be reached on price, terms of possession, or similar matters, it may be necessary to condemn the property through the process of eminent domain. Usually, eminent domain procedures are prosecuted by the agency authorized to make the purchase, but there are a few exceptions. In Delaware, the State Board of Education may initiate eminent domain, although in that state the town council is ordinarily the agency authorized to procure a school site by purchase. Boards of education may acquire sites by purchase in New Hampshire, in cities above 70,000 in New York, and in the state of Vermont. However, in each of these states, any necessary condemnation proceedings are prosecuted by municipal authorities.

Theoretically, the owner of real estate can resist the condemnation of land when court proceedings are held. The district must show that the land is required for a public use and that the district has a necessity for it. This is the ordinary rule under eminent domain. However, the statutes sometimes provide that the showing of necessity can be made by a school district through

a formal resolution of the school board. Even in districts where the showing must be made in court, there are actually very few instances in which a land owner has been able to prevail against the taking of land for school purposes. The more common rule was stated by the Supreme Court of Colorado in a decision entered shortly after the turn of the century. "The power to determine the necessity of taking land for a schoolhouse site is vested in the school authorities of the district and is not a question for a commission or a jury."⁴

Similarly, an Indiana court held more recently that while under ordinary circumstances a request by local school authorities was adequate to justify eminent domain proceedings, the court might examine the matter in the event that fraud or other improper elements were involved in the taking. The Indiana court said,

We hold that a court may not inquire into the administrative determination of the propriety, reasonableness, or necessity of taking property, except for fraud, or where the proceeding is a subterfuge for taking the property for a private use.⁵

The only major exception to this appears to be that school districts have doubtful power to condemn property already devoted to public use unless there are specific authorizing statutes. Thus, in the Warren case just cited, the power of an Indiana school district to condemn the ground occupied by a cemetery was denied when the court found that there was no statutory authority in Indiana for a school district to condemn property under these circumstances.

The School District Defendant in Eminent Domain

The same rule would be presumed to apply where some other governmental agency attempted to condemn real estate presently occupied as a school site.⁶ School property has in fact been condemned for use by other governmental agencies in a number of different states and for a number of different

⁴Kirkwood v. School District, 45 Colo. 363, 101 P. 343 (1909).

⁵Cemetery Company v. Warren School, 236 Ind. 171, 139 N.E. 2d 538 (1957).

⁶People v. Community Unit School Dist. No. 3, 2 Ill. 2d 454, 113 N.E. 2d 241 (1954).

reasons. Action is usually taken by governmental agencies under some statutory provisions similar to the following, quoted from the Statutes of Missouri.

Property devoted to a public use may be acquired in like manner (that is by condemnation) provided that no real property belonging to the municipality, the county, or the state may be acquired without its consent.⁶

Provisions of this kind have recently been inserted into the statutes of a number of the states in connection with urban renewal or highway construction. The statutes usually authorize eminent domain under such conditions by defining the new authorization use as a "more necessary public use" or "superior public use." The Minnesota Statutes provide an example.

Real property in an area needed or convenient for a project which is to be acquired by condemnation pursuant to this section may be acquired by the authority for the project, including any property devoted to public use whether or not held in trust. . . it being expressly determined that the public use in conformity with the provisions of this act shall be deemed a superior public use.⁷

The concept of "superior public use" or "more necessary public use" is a relatively new one in American legal practice and its application is still being developed. The expressions are statutory terms and precise definitions are still to be developed by the courts. The necessity for court definition of the terms is usually removed where the statute itself provides that the condemnation of publicly held real estate shall be deemed "a superior public use" or "a more necessary public use" when exercised by urban renewal authorities, state highway departments, or other agencies which have been granted this particular power of condemnation.

These recently adopted statutory provisions which permit one governmental agency to condemn the real estate held by another provide a specific application of the idea that the power of eminent domain is a residual attribute of sovereignty retained by the state government itself. It may be

⁶Vernon's Annotated Missouri Statutes, 1949, Sec. 99.460.

⁷Minnesota Statutes, 1957, Sec. 462.445.

exercised by subordinate agencies of the state only under the terms stated by the statutes. Thus, there is no question of the right of one public agency to condemn the property of another when that power has been confirmed by statute. Similarly, the defendant agency is required to yield under the same terms.

Measure of Damages

The principal question which succeeds concerns the measure of damages, if any, the defendant agency is entitled to receive. The general rule is, that in the absence of statute, the defendant agency is not entitled to any compensation when its property is taken through condemnation by another governmental agency.⁸ The general theory is that all governmental agencies inferior to the state hold their property in trust for the state and the state may change the trustee at will. When the state authorizes one subordinate agency to condemn the property held by another, in effect the state authorizes the taking agency to exercise this power without the necessity of paying compensation.

The question of paying for condemned property is, however, subject to control by statute and the statutes of a number of the states make specific provision for payment. In addition, where there is some uncertainty in the statutes with regard to the matter, the courts of some states have taken advantage of any statutory language available to require the taking agency to compensate the defendant agency. Thus, the New Mexico courts have ruled that any agency must compensate the defendant for land held by the latter in a proprietary capacity.⁹ The question of exemption from damages was argued vigorously by the State Road Commission in a Utah case involving the Salt Lake City School but was denied by the courts on statutory grounds.¹⁰ Similar holdings have been reached in respect to a county in New Mexico¹¹ and in the

⁸School District v. Pennsylvania, 383 Penn. 206, 117 A. 2d 702 (1955).

⁹State v. Albuquerque, 67 N.M. 383, 355 P. 2d 925 (1960).

¹⁰Utah State Road Commission v. Salt Lake City Board of Education, 13 Utah 2d 56, 368 P. 2d 468 (1962).

¹¹State v. Board of County Commissioners, 72 N.M. 86, 380 P. 2d 830 (1963).

Pennsylvania school case cited above where the general rule was stated that compensation was not required.¹² In this case, the Pennsylvania court found that in fact the Statutes of Pennsylvania allowed the school district to recover.

Where damages must be paid, the measure of damages is usually the value of the property at the time of taking. This rule has often been applied to school districts.¹³

This general rule on the measure of damages is not universally applied. The objective sought is fair treatment for each of the parties involved, and this may require another measure of damages rather than value at the time of taking. Thus, in a federal case, the Supreme Court said,

But the Fifth Amendment does not contain any definite standards of fairness by which the measure of just compensation is to be determined . . . The court in an endeavor to find working rules that will do substantial justice has adopted practical standards including that of market value . . . but it has refused to make a fetish even of market value since that may not be the best measure of value in some cases. At times some elements included in the criterion of market value have in fairness been excluded as, for example, where the property has a special value to the owner because of its adaptability to his needs or where it has a special value to the taker because of its peculiar fitness for the taker's projects.¹⁴

In extension of this general principle, the federal courts have adopted a rule which holds that where one governmental agency condemns the property of another and the statutes permit the award of damages, the measure

¹²School District v. Pennsylvania, 33 Penn. 205, 117 A. 2d 702 (1955).

¹³State v. Carpenter, 126 Tex. 604, 89 S.W. 2d 194 (1936); Board of Education v. Kanawha and Michigan Railroad Company, 29 S.E. 503 (West Virginia, 1897).

¹⁴United States v. Cors, 337 U.S. 325, 69 S. Ct. 1086, 93 L.Ed. 1392 (1949).

of damages is the cost of providing an adequate substitute for the property taken.¹⁵ The reasoning in these cases is that property already devoted to a public use has, as such, no market value. However, a governmental agency is under the duty of providing the services which the law commands. If the agency is to be placed in the same position that it held before the property was taken (the ordinary rule for the award of damages) the requirement is for a substitute facility. This rule has been applied directly to schools in the case of the *United States v. Board of Education* where the federal court said,

Where the highest and best use of property was for school purposes and for these purposes property had no market value, property's value for school purposes would be largely destroyed if other land were not acquired in substitution for land taken by the government through eminent domain proceedings. The board of education's recovery was not limited to the value of vacant lots to be acquired as substitution and it was proper to award severance damages to the residue.¹⁶

Although this rule has sometimes been denied where another measure of damages was available,¹⁷ the federal rule was adopted by the state court in a recent Texas case. In analyzing the issues of this case, the Texas court said,

There is a fundamental distinction between obligations resting on the agency condemning public property and that of condemning private property. This distinction lies in the obligation thereby imposed on the condemnee. For example, a private party owes no duty to the public to continue its operation either at its original location or elsewhere. It can move, it can stay, or it can liquidate as it alone sees fit. Not so with the school system

¹⁵*City of Ft. Worth v. the United States*, 188 F. 2d 217, 1951; *Brown v. United States*, 263 U.S. 78, 44 S. Ct. 92, 68 L. Ed. 171, 1923; *Jefferson County v. Tennessee Valley Authority*, 146 F. 2d 564 (1945); *United States v. Los Angeles County*, 163 F. 2d 124 (1947); *Town of Clarksville v. United States*, 198 F. 2d 238 (1952); *United States v. Des Moines County*, 148 F. 2d 448, 160 A.L.R. 953, 1945. See also: *Little Falls v. State*, 198 App. Div. 488, 190 N.Y.S. 807 (1921).

¹⁶*United States v. Board of Education*, 253 F. 2d 760 (1958).

¹⁷*Union Free School District v. State of New York*, 35 Misc. 2d 373, 230 N.Y. Supp. 2d 416 (1962).

charged with the legal obligation to the public. A school system suffering the loss of one of its schools by condemnation must replace that school when the facility is necessary to the education of its children as shown by the undisputed evidence in this case. This is the legally imposed duty on the school district and it has no other choice. . . .

It makes no difference whether the property had a market value or not, because the value of what the school has or what it has lost is not the inquiry before us. That inquiry is the cost of restoring the remaining facilities to a utility for school purposes equal to that enjoyed prior to the taking of the facility is reasonably needed to fill a public requirement.¹⁸

The Effect of Condemnation Upon School Districts

The question of the condemnation of school district property through the action of some other governmental agency and the payment of damages for it really involves one major form of intergovernmental limitation upon the discretion of school officials. When the property of a school district is condemned by some other governmental agency, the discretion of school authorities is limited to that extent in the management of its property. When a school is deprived of one piece of property, its officers have only the options of cancelling the school program involved or of providing substitute facilities.

When the courts have decided what damages must be paid to the school district for the taking of its property, they have limited the discretion which the district may exercise in providing substitute facilities. If the damages allowed are high, the board may have considerable freedom. If no damages are allowed or if the amount of the damages is low, the board may be required to use its other resources to provide substitute facilities. Thus, it may be unable to use the same funds for other preferred services or for other investments in school property.

Most of the statutory provisions on this issue appear to deal either with urban renewal authorities or with state highway departments, and

¹⁸State v. Waco Independent School District, 364 S.W. 2d 263 (Texas, 1963); See Also Town of Clarksville v. United States, 198 F. 2d 238 (1952).

relatively few issues appear to arise between school districts and urban renewal agencies. It is usually possible for a school district to exchange the property needed under an urban renewal program for other property which has been developed under that program. The exchange can usually be made on an equitable basis through negotiation and without the necessity of appeal to eminent domain. In some instances, the development of an urban renewal program has made it possible for school districts to liquidate on obsolete or dilapidated buildings. In some other instances, urban renewal plans have been drawn so that it was possible to continue using a good school building standing on a good school site to provide educational service for the redeveloped area.

It is not so easy to make similar accommodations in the construction of major highways. Highway departments do not have a comparable degree of flexibility in determining the route of newly proposed or authorized highways. Moreover, these authorities are seldom in a position to offer substitute sites or facilities to school districts. Thus, basic conflicts may more easily develop as highway departments and local school districts each undertake to carry out their respective governmental responsibilities.

Regulation Through Community Planning

Questions of site acquisition for school purposes are closely related to the larger question of community planning and its implementation through zoning codes and the regulation of school building construction. As the community planning function touches schools, this function may be defined as one which includes (1) an outline or pattern for land use throughout a community, and (2) a plan and program of public services and of facilities to provide them. The list of community services and facilities includes schools and other public buildings, streets and parks, utilities, a public transportation system, hospitals and other health services, and the many other services and facilities commonly found in American communities. Most of the states have authorized planning agencies in municipalities. A somewhat smaller number of states authorize county planning agencies, and some of them have also created regional agencies whose jurisdiction extends over a number of counties and/or municipalities.

These agencies have authority to plan; seldom to implement the plans. A municipal planning agency may develop a plan which can and may be subsequently adopted for the city in question. The city government then implements the plan as it authorizes individual development projects, controls land use through zoning ordinances, and adopts similar measures.

But city governments do not always do this. Planning agencies and independent observers have often complained of a deficiency in the composition and authority of community planning agencies. The fault lies in the fact that the planning agency is not also an executing agency. Thus recommendations, even if wisely and perceptively made, are at the mercy of regularly constituted governmental bodies for their implementation.

While it is not necessary that community planning agencies overlap, either in their responsibilities or in the territory they serve, nonetheless they commonly do so. Moreover, regularly constituted municipal governments, zoning commissions, and individual governmental agencies all have planning functions of their own to perform. Not the least of these are schools and local school districts. School districts are both planning and executing agencies, but school district plans may not always agree with those proposed by other community agencies.

Whatever may be the functions of a community planning agency otherwise, it is usually held that the "plans" which these agencies prepare and adopt are advisory upon school districts. This particular point was raised in a disputed situation in California.¹⁹ The dispute originated in an attempt by a school district to condemn a site for the erection of a new school building. A local planning commission had prepared a community plan for the Atherton community. The City Council of Atherton had adopted zoning regulations which implemented the plan. The school district felt that it was obligated to disregard the zoning ordinance in the location of a school site. Litigation followed and the case was eventually appealed to the California Supreme Court.

¹⁹Town of Atherton v. Superior Court, 159 Cal. App. 2d 417, 324 P. 2d 328 (1958).

This Court held first that the action of the local planning commission was advisory in nature and the school district was not obligated to follow its recommendations. The Court said,

These sections (of the California Statutes) provide that if the power to acquire such ground or building is in some other governmental body, that body after reporting to the planning commission may entirely disregard the disapproval of the commission Assuming that the city council under the statutes . . . have the power to zone schools, it is clear that such zoning is merely advisory or recommendatory and under (the California Statutes) such zoning is not binding on the school district.

Afterwards the court went ahead to point out that the state education agency in California is required under the applicable statutes to consider the master plan of a city when a local school district requests approval for the designation of a school site. But even the recommendations of the education agency have only advisory effects; the school district need not conform to them. These districts were held to be at liberty to disregard the recommendations of both local planning agencies and of the state education agency.

This decision was disturbing to some people in California who were familiar with the facts of the case and the decision was widely discussed. The implications of school district autonomy in the selection of sites were analyzed shortly after the Atherton decision by Donald J. Morgan in the California Law Review. Morgan said,

Even though the need for schools is clearly established, the building of a school may create serious problems for a city. A traffic problem is often created, requiring the installation of traffic lights or stop signs. The street on which the school is to be located may not be of adequate width to handle the extra traffic and parking may be a problem. A city may be required to install sidewalks, storm drains, fire hydrants, or sewers. Additional fire and police protection may be required. A school built in a residential area changes the character of the neighborhood often lowering its aesthetic quality and thus decreasing property values. This in turn results in a decrease in revenue derived from property taxes. Coupled with the loss of tax revenue from the property actually converted to school purposes, the burden to a community may be heavy indeed.

The school board on the other hand, must locate schools in a manner which best serves the interests of education. If schools are forced into business and commercial areas, the problems of noise and congestion arise. Land may be more expensive and there is often less light and air.²⁰

In view of this analysis, Morgan recommended the adoption of a bill which had been introduced in the California Legislature in the 1957 session. This act would have required all local agencies of government in California to "comply with all applicable zoning and regulatory ordinances of counties and cities." However, this proposed legislation has not yet been adopted by the California legislature.

The conditions described by Morgan are nonetheless very real, and they may commonly be found in urban and some rural areas. The difficulties resulting from the overlapping authority and overlapping territorial jurisdiction of planning agencies makes the regulation of such problems very difficult. One alternative method of protecting the public interest where schools are concerned lies in the allocation of responsibility to some state agency to supervise the actions of local school districts in the selection of school sites and the construction of school buildings. This is the alternative followed in California where the Statutes provide:

The Department of Education shall:

A. Advise with the governing board of each school district on the acquisition of new school sites, and after a review of available plots give the governing board of the district in writing a list of the approved locations in the order of their merit considering especially the matters of educational merit, reduction of traffic hazards, and conformity to the organized regional plans as presented in the master plan of the planning commission having jurisdiction.

B. Establish standards for school buildings.

C. Review all plans and specifications for buildings in every district required to submit plans and specifications therefor to it for approval. The department may, upon the request of the governing board of any other district, review plans and specifications for buildings in such district.

²⁰Donald J. Morgan, "City Planning: Location of School Sites: Conflict with the Municipal Zoning Ordinance," 47 California Law Review, 171.

A schedule of charges for such services shall be formulated by the department.

D. Approve plans and specifications submitted by governing boards of school districts, and return without approval and with recommendation for changes, any plans not conforming to established standards.

Make all necessary provisions by which governing boards of school districts, or architects engaged by them, may procure by purchase or otherwise, copies of standard specifications, plans, and building codes prepared by the department.

F. Make, upon the request of the governing board of any school district, except a city board of education, a survey of the building needs of the district, advise the governing board concerning the building needs, suggest plans for financing a building program to meet the needs, and collect the cost of the survey, exclusive of the salaries of the state employees participating therein, from the district.

G. Employ experts, and clerical and stenographic assistants as may be required for expediting the checking and approving of plans and specifications.²¹

Disputes between school authorities and any of the agencies which have responsibility for community planning may possibly be appealed to the courts when enforcement of the community plans are undertaken. Where sites are concerned, these are most likely to arise in the enforcement of zoning regulations.

Regulation Through Zoning Codes

Urban zoning is a device used to control the physical development of cities. It is related to city planning and is often a device for implementing city plans. As the terms are usually used, city planning involves the investigation of the physical, economic, demographic and other resources of a community, speculation as to the wisest use which may be made of these to reach desirable life patterns for the area, and the actual design of plans involving land use and social, political, economic, aesthetic, and other activities thought to be beneficial in approaching these ends. Zoning is one of the legal and administrative devices by which some of these activities (especially land

²¹California Education Code, Sec. 15302.

use) may be controlled. Both planning and zoning have implications for the intergovernmental control of public schools.

Zoning is a governmental device employed under the police power of the state. Since the locus of the police power lies in the sovereignty of the state government, it follows that zoning activity can be carried on by any local governmental agencies only where statutory authority has been granted by the state.²² Similarly, zoning activities can be carried on only within the scope of the delegation of power made to a local governmental agency by the state. As an application of the police power, zoning regulations have repeatedly been said by the courts to require a reasonable and substantial relationship to public health, safety, morals, or general welfare.²³ "General welfare" in this case is a broad term used to cover such matters as public comfort, convenience, economic advantage, and similar matters. While zoning may sometimes cover aesthetic questions as well, power to zone for aesthetic purposes is usually limited and sometimes denied.

In one particular sense, zoning regulations differ sharply from other devices used to enforce the same objectives. Codes for building construction, for example, are applied uniformly throughout a municipality. Under typical zoning regulations, a city is divided into a number of districts or "zones" and the restrictions and regulations of land use differ from one of these zoning districts to another. Where these differences in regulations are related to substantial differences in land use or other characteristics of one district as compared to another, they satisfy the criterion of reasonable classification. Zoning regulations must apply equally to all subject matter of the same kind within individual zoning districts.

Historically, the question of how or to what extent school districts must comply with local zoning regulations has been a matter of considerable controversy. The question of school district compliance, like that of the entire subject of zoning, is subject to control by statute. In a considerable

²²Or where conferred on home-rule cities under constitutional provisions which have the same effect.

²³State ex rel Synod of Ohio v. Joseph, 139 Ohio 229, 39 N.E. 2d 515 (1942); State v. Sinar, 267 Wis. 91, 65 N.W. 2d 43 (1954); Matter of Concordia Collegiate Institution v. Miller, 301 N.Y. 139, 93 N.E. 2d 632, (1950).

number of the states, zoning laws are based upon a Standard State Zoning Enabling Act.²⁴

As adopted by the various states, the language authorizing local agencies to zone their respective areas, even though taken from a model code, usually appears in such general terms that its applicability to schools is uncertain. On the contrary a few states are quite exact in their provisions. For example, a 1956 act in Massachusetts provides,

. . . no ordinance or by-law which prohibits or limits the use of land for any church or religious purpose or any educational purpose whether public, religious, sectarian, or denominational shall be valid.²⁵

Under other statutes, determination of the question of whether zoning regulations apply to schools usually requires litigation, or at least the reference of an issue to the attorney general or other state official having power to issue official opinions on the matter.

The great majority of school districts have had little experience with zoning restrictions. Much of the territory of individual states is not subject to zoning--no government agency has been granted the power to zone this territory. Many schools are located in unzoned territory. Even where authority to zone has been granted and the zoning district has adopted zoning ordinances, these may be drawn in such a way that they do not apply to schools.

In other instances, particular regulations may not be burdensome so far as schools are concerned. Plans for school construction may be well within the requirements of zoning regulations, so that schools may routinely comply with the regulations without even raising the question as to whether they are legally required to do so. In other cases, the school board may

²⁴U. S. Department of Commerce, Advisory Committee on Zoning, A Standard State Zoning Enabling Act, Washington, D. C.: U. S. Government Printing Office, 1922. There have been a number of subsequent revisions.

²⁵Massachusetts, Acts and Resolves, 1956, Ch. 586.

decide voluntarily to comply with zoning requirements because present benefits either to the school district or to the community seem to the school board to be overriding considerations.

The general rule is that in the absence of clear statutory provisions, zoning restrictions cannot be applied to the state government or to any of its agencies that have been invested with the right of eminent domain.²⁶ Schools are such agencies.

The zoning device has been used at times in an attempt to prevent a school district from locating a school building within certain zones--sometimes in effect denying the right to construct a school building in a particular municipality at all. One New York school district included both the town of New Hempstead and the village of Hewlitt Bay. There were a number of elementary schools in the village of Hewlitt Bay, but there was local objection to the location of a high school within the residential area of this village. The village government attempted to prevent the location of the high school by a zoning regulation. This action was overturned by the New York Supreme Court in two companion cases. In the latter case, the New York Supreme Court said,

Villages are empowered by law to adopt zoning ordinances for the purpose of promoting the health, safety, morals, or general welfare of the community, but any such regulations adopted must be designed to facilitate the adequate provision of schools. . . . The village, in absence of a specific grant of power, cannot by a zoning regulation prevent the location of a school within its borders and thereby prohibit the performance by the school district of the duty imposed upon it by law.²⁷

After decisions such as this have been pronounced, there is sometimes a question as to how the ruling will apply to specific school situations.

²⁶State v. Allen, 153 Ohio St. 168, 107 N.E. 2d 345 (1952)

²⁷Union Free School District v. Hewlitt Bay Park, 107 N.Y.S. 2d 858 (1951); Union Free School District v. Hewlitt Bay Park, 198 Misc. 932, 102 N.Y.S. 2d 81 (1950). Compare to same effect, State v. Sinar, 267 Wis. 91, 65 N.W. 2d 43 (1954); Great Neck Community School v. Dick, 140 N.Y.S. 221 (1955).

One school district presented this question to the Comptroller of the State of New York who ruled that,

School districts are not subject to town zoning provisions regarding setbacks, selection of school building sites, school building construction and size of open areas surrounding school buildings.²⁸

The question of the applicability of zoning codes to school situations has been raised in other states also. The California Supreme Court ruled that school districts need not comply with zoning codes in the Atherton case where the questions of both planning and zoning were raised.²⁹ And in Missouri, the State Supreme Court upheld a school district when the city of Ladue attempted to prevent the construction of a school within the city, using the following language,

The Constitution and the statutes vest exclusively in the school districts the power to select, locate and procure by condemnation sites for public schools and the city of Ladue zoning ordinance excluding schools from a zone of the city could not preclude the school district from taking land therein as a site for the erection of a new school house.³⁰

It should be noted that school district independence of zoning codes does not extend indefinitely. Different rules may apply to specialized kinds of schools or to particular activities of schools. The construction of gymnasiums and stadiums for high schools have frequently been challenged under zoning regulations, but the right of a school district to construct these

²⁸In the Opinion of the State Comptroller (New York) File No. 5835 (1952). Rulings of this sort may be issued in the state of New York by the State Attorney General, the State Commissioner of Education, or the State Comptroller. Each of these agencies operates independently of the others, but with an accumulation of a body of opinions over the years, rulings from each of the agencies tend to agree with those issued by the other two.

²⁹Town of Atherton v. Superior Court, 159 Cal. App. 2d 417, 324 P. 2d 328 (1958).

³⁰State v. Ferriss, 304 S.W. 898, (Missouri, 1957).

facilities has usually been upheld.³¹ The Klein case was argued on the basis that night football constituted a nuisance and therefore the school district was subject to regulation. The court made a decision to the contrary on the basis of the facts in the case, but the language of the decision appeared to imply that if the operation of facilities accessory to a school did in fact become a nuisance, a ruling against a school district might be possible. This issue does not appear to have been raised in subsequent cases.

Objection is sometimes raised to the location of vocational and trade schools within a residential area. Rascop points out that while rulings favorable to a school district may be obtained when locating a vocational school in a residential area, if in fact the operation of the school invades the areas of public safety, health, morals, and general welfare, the school may be subject to regulation.³²

The point may be illustrated by two contrasting cases. In the first, objection was raised to the operation of a private school presenting vocation training in the business area--typing, bookkeeping, and related courses.³³ This type of a school program was held to be an "educational purpose" (which is public) and therefore within the protection of a Massachusetts statute permitting such schools and hence not in violation of a zoning ordinance.

The issue was also raised in Spokane, Washington, when an elementary school was changed to a trade school. The court held that the noise, fumes, and general confusion produced by the operation of machinery and shops would be a disadvantage to the neighborhood. Thus, a trade school could not be considered as an enlargement of a pre-existing use and could not be permitted under the city ordinance.³⁴ In effect, this decision held that school districts

³¹Board of Education v. Klein, 303 Ky. 234, 197 S.W. 2d 427 (1946); Alexander v. Philips, 31 Ariz. 503, 254 P. 1056 (1927); Property Owners Association v. Board of Zoning Appeals, 123 N.Y.S. 2d 716 (1953); Commissioners of District of Columbia v. Shannon and Lichs Construction Co., 57 App. D.C. 67, 17 F. 2d 219 (1927).

³²Rascop, Arden H., The Law of Planning and Zoning, Third Edition, New York: Mathew Bender and Company, 1962, p. 13-1.

³³City of Worcester v. New England Institute, 335 Mass. 486, 140 N.E. 2d 470 (1957).

³⁴Shields v. School District, 31 Wash. 2d 247, 196 P. 2d 352 (1948).

were subject to regulation when the operation of schools produced effects which might be undesirable in residential neighborhoods.

Summary

The problem of regulating land use is a difficult one as urban communities expand rapidly. The location of schools has an important relation to it. New ways of controlling land use are tried from time to time, but the location of schools is ordinarily given a high priority. There is some municipal regulation of school sites, but for the most part the administration of school sites is either an independent prerogative of local school officials or of these officials subject to the regulation of state educational, health, or other specified agencies.

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CHAPTER VI THE REGULATION OF SCHOOL BUILDINGS

Once the problems of locating a site for a school building have been met, additional questions arise which are related to the actual construction of the building. These questions involve the governmental responsibilities grouped under the police power of the state. They are also concerned with questions of the design and construction of school plants through which the educational program can best be facilitated and a high level of educational efficiency can best be reached.

The police power is concerned with the protection of health, safety, comfort, morals, and often the convenience of its citizens. Since any of these may be involved in the construction and operation of a school building, the regulation of school building operation and maintenance may properly fall within the general exercise of the police power.

The educational question in relation to school building design, construction and operation is no less pervasive. It is sometimes said that, "Every feature of a school building is educational." School buildings are primarily designed to house the various activities of education, and it is important that they be designed in such a way that they will facilitate those activities, whatever they are. It is also important that the building itself reinforce the values sought to be inculcated in aesthetics, safety, sanitation and health, economic considerations, and the broad responsibilities of citizenship.

Usually, education and other public purposes complement or reinforce each other. Upon occasion, the objectives sought through the police power may conflict with the objectives of the educational program and a question of priority must be determined. In either case, objectives in the design, construction, and operation of school buildings are commonly sought to

be realized by (1) the formulation and promulgation of a set of codes to govern school building planning and construction, and (2) the approval of plans and specifications for individual school buildings. Subsequently, (3) the purposes of protection and education are sought by various continuing procedures of enforcement such as inspection.

Codes for School Building Construction

Both education and the use of the police power are functions of state government. As such, they may be exercised directly by the state, they may be specifically allocated to local agencies, or they may be left to local initiative by legislative silence.

The last named alternative represents a localist or possibly a laissez faire attitude toward the control of these matters. In a very few states there are no express requirements that local school authorities follow any particular set of standards in the design of school buildings or that approval for the design of school buildings be secured from any agency of government whatever.

There may be a requirement that a licensed architect be employed to draw plans for school buildings above a certain minimum cost, but there appears to be a public assumption that this will be adequate to protect the public interest. Similarly, a few other states grant a large measure of autonomy in building matters to certain specified classes or categories of school districts.

Too broad conclusions regarding school district independence ought not to be drawn from these circumstances. Where an architect is required, he will get most of the engineering specifications for buildings from a handbook of standard specifications, so that health and safety requirements are no doubt regularly observed. Construction engineers (specialists in construction materials and methods) are commonly employed by architects to write or check the building specifications which involve these questions.

If municipal or state specifications are available, the architect may often incorporate them for his own personal protection. Similarly, local

school authorities may prefer to observe municipal codes, at least where convenient. If they have done so, they will have protected themselves from criticism for any unfortunate events which might later occur. Moreover, related statutes and regulations not immediately applying to schools may actually influence school construction indirectly or through any of the familiar informal pressures.

As a single illustration, the state of Nebraska does not require its local school districts to comply with any established building codes--state, municipal, or otherwise. Similarly, plans for new construction need not be approved. However, school buildings are subsequently subject to inspection and the enforcement of safety and health regulations by the State Fire Marshal's Office and the State Department of Health. School buildings must be operated in a manner which will satisfy these regulations. Thus, both local school authorities and their architects are in fact subject to a different style of control which has effects similar to those produced directly in other states.

Codes for school building construction are applied through a broad variety of means. There are a few instances in which specific codes applicable to school building construction are inserted in the statutes. In a number of states, the state education agency is authorized to establish standards for the construction of school buildings. In some of these states, limitations are imposed on the freedom of the education agency to prepare codes, or the agency is required to "consult" with other state agencies having some interest and competency in the areas in question. These admonitions grade over into another pattern where the state education agencies are directed to prepare building codes with the approval of other state agencies or jointly with them.¹

It is perhaps more significant to ask how, in any of these instances, the state codes are designed. The practices of school building construction throughout the country have a high degree of uniformity. This is in part the result of common agreements among engineers, architects, and educational planners as to what are desirable characteristics for school buildings. To be

¹There may be legal exceptions to generalizations stated--either for chartered school districts within individual states or for others exempted by statutory provisions.

sure there are unusual and unconventional buildings. In recent times there has been a considerable premium placed upon invention and innovation in school building construction. But even here, the basic requirements for health, safety, and engineering practice are regularly applied. Innovations which violate these requirements are usually met with a rather stern skepticism.

Some building codes are arrived at legislatively--that is, as a result of group action by interested educators, architects, engineers, specialists in health, safety, fire protection, and perhaps citizens at large. Such codes often reflect compromises, and to that extent may sometimes be faulty or inconsistent.

Other codes may be formulated through the consolidation of expert testimony. This would seem to be a necessary practice in states like California where earthquake protection is a primary consideration, and where sound decision would seem to require the opinions of professionally competent architects, engineers, and other experts on construction.

But beyond all these, there is a very common practice of relying on one or a number of standard codes for the formulation of state school building requirements. Thus, in the state of South Carolina, the State Finance Commission (which is required by law to approve school building plans) uses the Guide for Planning School Plants² as a basis for evaluating and approving school building plans. This is an unusual use for the Guide, but where its use is directed toward the educational planning of the school building, it may result in considerable improvements. Similarly, the Statutes of Arkansas require the State Board of Education to take into account the recommendations of the Arkansas Chapter of the American Institute of Architecture, The Arkansas Fire Prevention Bureau, and the Arkansas State Board of Health.³

A number of states adopt by reference regional or national standard guides for the construction of public buildings, or designate guides for specific purposes. The Statutes of North Carolina provide an example.

²National Council on Schoolhouse Planning, Guide for Planning School Plants, East Lansing, Michigan: The Council, 1958.

³Arkansas Statutes, 1947, Sec. 80-3505.

Standards to be Followed in Adopting the Code.--All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed liberally to those ends. Requirements of the Code shall conform to good engineering practice, as evidenced generally by the requirements of the National Building Code of the National Board of Fire Underwriters, the Southern Standard Building Code of the Southern Building Code Congress, the Uniform Building Code of the Pacific Coast Building Officials Conference, the Basic Building Code of the Building Officials Conference of America, Inc., the National Electric Code, the Building Exits Code of the National Fire Protection Association, the American Standard Safety Code for Elevators, Dumbwaiters, and Escalators, the Boiler Code of the American Society of Mechanical Engineers, Standards of the National Board of Fire Underwriters for the Installation of Gas Piping and Gas Appliances in Buildings, and standards promulgated by the American Standards Association, Underwriters' Laboratories, Inc., and similar national agencies engaged in research concerning strength of materials, safe design and other factors bearing upon health and safety.⁴

It must be expected that codes developed by health departments, fire protection agencies, or local municipalities are prepared in much the same way. The principal source of any of these codes is found in statements of engineering specifications or other published standard codes.

In a sense, the use of standard codes is one way in which the expertise of specialists is tapped and applied to school problems. Expert services and expert opinions are increasingly important in a technical society. Many school problems are both political and technical in nature, and it is sometimes difficult to reconcile political with expert opinion. The use of standard codes is one way in which the expertise of specialists can be applied to problems in school construction.

The net effect of all of this is that there is little of the pretended autonomy of local school authorities to construct buildings as they please. One kind of code or another is likely to restrain local educational agencies from the exercise of independent discretion. If nothing else, standard building codes and standard engineering specifications are likely to

⁴General Statutes of North Carolina, Sec. 143-138.

control the professional discretion of an architect significantly, even where there are no formal codes which directly apply to the school building construction being contemplated.

It is widely observed that building codes tend to require the use of specified materials and methods of construction long after improvements are available. It is probably true that some archaic provisions increase the cost of school buildings. Self-protective features inserted by private groups may have the same effect. It is even possible that established codes may inhibit the use of imagination and initiative in the design of desirable educational features in buildings.

But against all of these must be stated the public necessity that school buildings be constructed with adequate protection from the violence of fires, wind storms, earthquakes, and other physical dangers. It is essential that the occupants of school buildings be protected from physical injury which might originate in poor design or construction, and that any necessary steps be taken to guarantee reasonable protection. All favorable and unfavorable ideas must be balanced. The balance currently prevailing would appear to be in favor of the use of standard codes prepared with the participation of educational, engineering, and other specialists.

Approval of School Building Plans

The power to enforce school building regulations is separable from the power to promulgate regulations. Under usual circumstances, these two actions complement each other or are in fact part of the same process. But it is notable that in a few instances state school building codes are advisory in nature. In other cases, the publications of state education agencies may extend to matters beyond precise legal requirements which are enforceable.

Discussion of the approval of school building plans may perhaps be more clearly undertaken if the range of public policy is summarized. The various procedures employed by the states include the following alternatives.

1. A local school board is empowered to construct a school building without complying with any code or securing the approval of any plans.

2. Building plans (and specifications) must be prepared by an architect, but are otherwise subject only to local school board approval.
3. Plans and specifications are subject to the approval of some local or intermediate school officer such as the local superintendent or county superintendent of schools.
4. Plans must be approved by some municipal agency of government.
5. Plans must be approved by the state education agency.
6. Plans must be approved by one or more state agencies other than the state education agency.
7. Some combination of these approved schemes may be required.
8. Approval by some state agency may be required, but the statutes may require that building plans conform to the most strict provisions applicable under the school building code promulgated by the state education agency, any other state agency, or by a local municipal government. Local governments may be authorized to develop codes which impose building restrictions extending beyond basic state requirements.
9. Freedom from the requirement of state approval may be followed if only local funds are used for construction; but any of the other approval procedures may be required if state funds are to be used.

A list such as this one indicates the wide variation of practice. But as a matter of fact, the prevailing methods lie within a much narrower range. Only about a half-dozen states permit all of their school districts to undertake school construction without formal approval of plans and specifications by any agency except the local school board of their administrative officers.

State Approval of Plans

Approval of school building plans by some state agency is a more common requirement. This may be a function of the state education agency, or of some other state agency such as the state health agency or the state agency responsible for fire protection and safety. Often school plan approval is a responsibility of a number of state agencies.

One particularly comprehensive approval procedure is found in the state of Indiana. When new school building construction is undertaken in that state, approval is required for the purchase of school sites by (1) the State Commission for the Reorganization of School Corporations, (2) the State Board of Health, and (3) the Division of Schoolhouse Planning (in the office of the State Superintendent of Public Instruction.)

The Division of Schoolhouse Planning must also give tentative approval for the construction project. This authorizes the local school district to plan the project, hire an architect, and sell bonds. Indiana is one of the states which permits for the construction of school buildings by a "school building holding corporation" and the use and eventual acquisition of the building under a lease-rental contract. If this procedure is to be followed, the district must obtain a Certificate of Educational Necessity from the State Superintendent. A lease-rental agreement is then executed by the district with the local school building holding corporation. This agreement must be approved by the Indiana State Tax Commission in order for the holding corporation to proceed with the sale of bonds.

Formal plans and specifications are then prepared. These are subject to approval by the following state agencies in the order given:

1. Administrative Building Council⁵
2. State Fire Marshal
3. State Board of Health
4. Division of Schoolhouse Planning
5. State Board of Accounts.⁶

⁵A statutory body appointed by the governor, whose responsibility is to oversee and coordinate all construction undertaken by departments or agencies of the state.

⁶The state agency responsible for the post-audit of school accounts. This agency approves the financial actions necessary to carry out the project (bond issues, tax levies, etc.) and retains signed copies of the plans and specifications as authorizations for the various expenditures which must be made in completing the construction.

This is a formidable list. Actually, the routines for processing school building requests in Indiana have been fairly well standardized and the various people involved are familiar with them. Under ordinary circumstances, the necessary documents are processed from one office to another with a high level of consideration for the responsibilities of each particular agency but with reasonable promptness and only reasonable restraints.

It is worth-while, however, to examine certain aspects of the Indiana situation in a little greater detail. These may presage developments in the administration of schools in other sections of the country where the demands for governmental action appropriate to urbanized areas have not yet become so intense.

A number of the architectural firms in Indiana have employed a regular staff member whom they refer to as an "educational consultant." These individuals are usually trained in professional education and often have had extensive experience as school administrators. Their duties include the kind of assignments usually given to educational consultants. They sometimes guide the progress of a set of proposed school building plans through the various agencies that are required to approve them.

This is not regularly necessary. But if there are peculiarities in the local situation which require some changes from ordinary building design, if there is an appeal from an unfavorable ruling, or if there are specific building needs which can be facilitated by securing a "variance" from the stated regulations, the school building consultant may make the necessary explanations to the agencies. If formal hearings are necessary, he may appear at the hearing with the architect, local school officials, the school district's attorney, or others.

Some of these activities may be peculiar to Indiana, but any of them may exist elsewhere--in kind if not always in degree. In individual instances, they may be more complex or difficult elsewhere, depending upon the necessity for governmental regulation and upon the standardization of administrative procedures.

A number of these activities are found elsewhere among the expected responsibilities of architects. Others may be performed by the superintendent of schools or a member of the administrative staff of the local school district who is particularly qualified for such an assignment.

This illustration has implications for the operation of schools under a variety of circumstances in which intergovernmental controls are involved. Where the needs represented by the complications of an urban civilization require intense and detailed regulation, an additional pattern of administrative responsibilities may be created. These responsibilities are to comply with regulations, to analyze and explain local problems which may arise under the regulatory procedures, to coordinate local school district activities with those for which other governmental agencies are responsible, and to negotiate or otherwise act as the representative and advocate of the local school unit. And while the procedures will likely be different in individual situations, some of the same kind of administrative responsibilities may be found in many areas where a considerable degree of regulation is exercised by municipal or other non-school agencies of government.

Approval procedures may be considerably simplified where only a single approval must be obtained--for example, from the state education agency. Even in this case, the approving agency may voluntarily consult with or secure informal approval of proposed school building plans from other agencies which may eventually be concerned. Thus, a publication of the Texas State Education Agency states,

While Section 16 of Article 4477 of Vernon's Civil Statutes does not prescribe that the plans and specifications of a school shall be reviewed by the State Health Department prior to the erection of the facilities, it does require that all schools shall conform to established standards of good public health engineering. It is, therefore, deemed advisable for the State Health Department to render this reviewing service prior to construction and to point out defects that would be a violation of the Act after the building is occupied.⁷

⁷Texas Education Agency, School Plant Services, Bulletin 543 (Revised), 1962, p. 11.

Similarly, the planning bulletin issued by the State Education Agency in Michigan contains the following statement,

It is not required by law that the State Fire Marshal's office approve plans and specifications for school buildings. That office is required, however, to inspect each building twice during construction, "one inspection to be made of the frame work of the building prior to plastering and one inspection shall be made on the completion of the building." It is the duty of the architect or engineer to notify the Fire Marshal when the building is ready for the required inspection.

Although the approval of the plans by the Fire Marshal's office is not required, that office always welcomes the opportunity to review plans and to consult with architects and others regarding items in which it has a particular interest, namely, safe means of egress, compliance with provisions of the law calling for fire resistant construction, and other matters in regard to fire safety. The Department of Public Instruction frequently consults with the Fire Marshal's office regarding plans which are submitted, especially when there are questionable features in regard to matters of interest to the Fire Marshal.⁸

The consultation here described may be undertaken voluntarily by local school officials as well. All agencies of government must eventually work together, and for the most part various agencies concerned with school buildings have similar objectives in terms of sanitation and safety. Where it is possible for local school officials to consult with officials in other governmental agencies on school construction problems, various benefits may result. When this action can be taken voluntarily, the stresses upon both the school program and the school finance plan by mandatory legal action can be avoided.

Municipal Regulation of School Buildings

The question of municipal regulation of school building construction produces a whole new set of uncertainties. Local school districts are creatures of the state. The basic question is, are they subject to municipal

⁸Department of Public Instruction, Planning Together for Better School Buildings, Bulletin No. 412 (Revised), 1956, p. 4.

building codes? Must they comply with these codes, have their school building construction plans approved by municipal agencies, secure building permits, and otherwise conduct themselves as private individuals must when the latter construct new buildings? This matter is subject to control by statute. Where the statute clearly grants power to municipalities to control school building construction or clearly denies it to them, few issues arise except in the details of administration.

Voluntary Compliance

The difficulty is that statutory codes are frequently silent on the question of municipal control. Recourse must then be had to the court decisions (often from other states) to determine the matter and the precise applicability of these decisions may also be uncertain. Thus, if municipal requirements are not too oppressive or expensive, school officials may comply with them voluntarily, especially since certain services of inspection and approval may be performed by the city as a routine part of the whole process.

This is sometimes encouraged by state agencies. Thus, in the state of Michigan, the State Education Agency urges architects to comply with local codes.

The relationship between local codes and ordinances and the state school building law is not elsewhere entirely clear at this time due to a circuit court decision which has not been appealed to the State Supreme Court. In general, no local code or regulation can void a state law or regulation. Whether local codes can go beyond state laws or regulations when not in conflict with them is not clear. It is urged, however, that architects make every effort to comply with local codes.⁹

Obligatory Compliance

Voluntary compliance does not answer all questions concerning the relationships between municipal and school governments at the local level.

⁹Department of Public Instruction, Planning Together for Better School Buildings, Bulletin No. 412 (Revised), 1956, pp. 4-5.

There may come a time eventually when the disadvantages of complying with municipal requirements may persuade school officials to adopt a different policy. The legal issues then have to be faced.

It is clear that municipal building codes are not applicable to the state itself.¹⁰ As the Kentucky Supreme Court said,

The principle is that the state when creating municipal governments does not cede to them any control of the state's property situated within them nor any property which the state has authorized another body to control.¹¹

The applicability of this principle to school districts is clear enough where the statutes contain a positive statement. Thus, in New Jersey, statutory language which provides that,

No board of education of any school district nor any board of education of a county vocational school shall be required to secure the approval of its plans and specifications for the erection or alteration of any school building or vocational school building or any part thereof by the municipality therein. Nor shall any board of education or any board of education of a county vocational school or any contractor doing work in connection with school buildings or county vocational school buildings be required to secure a building permit from the municipality.¹²

This language has been held to exempt school districts in New Jersey from observing municipal codes in a number of different situations.¹³

¹⁰City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).

¹¹Kentucky Institution for the Education of the Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402, 8 L.R.A. (N.S.) 533 (1906).

¹²New Jersey Statutes Annotated, 18:11-11.

¹³Board of Health of Plainfield v. Simkin, 10 N.J. Super. 301, 76 A. 2d 302 (1950); Smith v. Board of Education, 35 N.J. Super. 82, 113 A. 2d 187 (1955); Kaveny v. Board of Commissioners of the Town of Montclair, 69 N.J. Super. 94, 173 A. 2d 536 (1961). See also Salt Lake City v. Board of Education, 52 Utah 540, 175 P. 654 (1918); Board of Education v. St. Louis, 267 Mo. 356, 184 S.W. 2d (1960).

Freedom of school districts from municipal regulation appears to be firmly established whenever the statutes (or state regulations promulgated under authority of statute) appear to "occupy the field" in the regulation of school building construction. In a leading California case dealing with this subject, the Supreme Court of that state held that,

Constitutional provisions giving any county, city, town, or township (in California) power to enforce within its limits all local police, sanitary, and other regulations not in conflict with general laws does not confer upon the local unit power to regulate the construction of school buildings. . . . The state has completely occupied the field of regulating school building construction and construction of such school buildings by school districts is not subject to the building regulations of a municipal corporation in which the building is constructed. . . . The provisions of the Health and Safety Code (of California) requiring buildings with certain exceptions to meet certain standards as well as requiring building permits to be obtained from proper city or county officers charged with the enforcement of laws for regulating construction do not limit or modify provisions of the Education Code delineating standards for public school buildings.¹⁴

This rule is not universally applied. In cases where there is some statutory indication that the legislative intent is for municipal authorities to regulate school building construction, the power to do so has been upheld. The appellate courts of a number of states have also taken this position where the allocation of power to control the construction of school buildings is not clear and there is doubt that the state itself has "occupied the field."¹⁵ The reasoning in this series of cases is that the problems of health and safety constitute an "evil" of such magnitude that it cannot be presumed that the legislature intended to ignore it. Some legislative remedy must have been provided. School districts, as quasi corporations, have only limited powers

¹⁴Hall v. the City of Taft, 42 Cal. 2d 177, 302 P. 2d 574 (1956).

¹⁵School District v. Pasadena, 166 Cal. 7, 134 P. 985, 47 L.R.A. (N.S.) 892 (1913); Cook County v. Chicago, 311 Ill. 234, 142 N.E. 512, 31 A.L.R. 442 (1924); Cedar Rapids Community School District v. City of Cedar Rapids, 252 Iowa 205, 106 N.W. 2d 655 (1960); City of Groves v. Port Arthur Independent School District, 366 S.W. 2d 849 (Texas, 1963).

and these do not include the police power.¹⁶ Since cities, towns, and villages are commonly endowed with general powers of government including the police power, there is a presumption that in the absence of any other specific delegation of power or of pre-emption of the field by the state, these municipalities have the power to regulate school buildings.¹⁷

It will be observed that two California cases have been quoted--one on each side of the question. In the earlier Pasadena case, the California Supreme Court stated that,

The state might provide, in the exercise of its police power and under a general law, for a complete system of regulation for the protection of public health, safety and comfort in the erection of school buildings.¹⁸

This statement made it possible for the contrary ruling in the later Taft case after the pre-emption of school building regulation by the state of California was pleaded in a suit, and when in fact the regulation of school buildings had been undertaken by agencies at the state level.

Both the consolidation of local school districts into larger territorial areas and the growth of urban communities across civil government boundaries encourage the development of state plans for the regulation of school building construction. State supervision can assure some minimum protection which might be neglected in individual local areas where growth has been rapid and the machinery of government has not kept pace. Under these conditions a single school district might be subject to the regulation of school building construction by more than one municipality. This was recognized by the Supreme Court of New Jersey in the Kaveny case.¹⁹

¹⁶Education itself constitutes one exercise of the police power. In these cases, the court is concerning itself not with programs of general welfare such as education but with the police power in the more restricted sense of protection.

¹⁷State v. City of Mexico, 255 Mo. 612, 197 S.W. 2d 301 (1946).

¹⁸School District v. Pasadena, supra.

¹⁹Kaveny v. Board of Commissioners of the Town of Montclair, op. cit.

Another specific example developed in the state of Minnesota as a result of school district consolidation. One of the school districts found that it was subject to individual building codes from four villages and one city, each of which governed a part of the territory of the school district. The state education agency in Minnesota, under statutory authority, publishes a Guide for Educational Planning of Public School Buildings. The board of education of the local school district in question, hoping to standardize its buildings, asked the Minnesota attorney general if it might follow the state criteria rather than observe the building codes of the individual governmental units within its boundaries. The attorney general replied,

We are of the opinion that criteria contained in the manual (published by the state education agency) supersede any local building code adopted by a village or a city council within the school district and that the school district not only has the authority to use the "criteria" as a building code, but is required to do so under the Statutes.²⁰

Permits for Constructing School Buildings

The question of whether a school district may be required to obtain a permit from the municipality in order to construct a school building is related to the question of required conformance to school building codes, but is not identical with it. If a school district is required to get a building permit, it may be required to comply with stipulations made by a municipality as a prerequisite to the issuance of the permit. Thus, the requirement that a school district obtain a permit might have the same effect as a requirement that the district conform to the local building code.

No doubt there is some positive correlation between a requirement that a school district comply with a building code and a requirement that it obtain a building permit. But the relationship is not consistent. Some school districts may, under the interpretation of statutes, be exempt from complying with the codes but be required to obtain a permit (especially if the city performs inspection service as a benefit to permit holders). In other situations,

²⁰Opinions of the Attorney General, Minnesota, 1958, No. 5088.

school districts may be required to comply with the building code, but the permit requirement (or at least the fee for it) may be waived. Although school districts have been required to obtain building permits in certain cases,²¹ the requirement that a school district obtain a permit has more frequently been denied.

The issue of school district compliance with local ordinances requiring building permits is sometimes raised in connection with statutes dealing primarily with other subject matter. Such questions are frequently presented to state attorneys general. Thus, in the state of Iowa where school districts have been held to compliance with local building codes, the attorney general ruled that school districts must also obtain building permits.²² In an older ruling in Minnesota, (where school districts are not required to comply with building codes) the attorney general pointed out that the districts might expect to receive valuable services in terms of examination of plans and specifications and inspection of the building during construction, and that therefore the districts should obtain building permits.²³

In Michigan, the attorney general ruled that school districts need not obtain building permits from townships²⁴ or from home rule cities.²⁵ The attorney general of Ohio ruled against local power to require building permits²⁶ quoting from an older Ohio case in which the court said,

The general assembly of the state having enacted a general law requiring the building inspection department of municipalities having a regularly organized building inspection department to approve plans for the construction of public school buildings erected within such municipality, a municipality is without power to thwart the operation of such

²¹Bowers v. Wright, 4 W.N.C. (Penn.) 460 (1877); School District v. Pasadena, op. cit.; City of Groves v. Port Arthur Independent School District, op. cit.

²²Opinions of the Attorney General, Iowa, 1950, p. 201.

²³Opinions of the Attorney General, Minnesota, 1950, p. 87.

²⁴Opinions of the Attorney General, Michigan, 1955-56, p. 687.

²⁵Opinions of the Attorney General, Michigan, 1959, p. 3.

²⁶Opinions of the Attorney General, Ohio, 1956, p. 166.

general law by the enactment of an ordinance requiring the payment of a fee as a condition precedent to compliance therewith.²⁷

A slightly different question was raised in Ohio more recently. The city of Cleveland enacted an ordinance which required master plumbers to furnish a performance bond guaranteeing that construction work that the plumber might do would comply with the city building code. Since Ohio school districts were already exempt from express compliance with the building code, questions were raised as to (1) whether the school district might be required to furnish a performance bond covering construction work, or (2) whether a school district's employee might be required to furnish such a bond. The attorney general pointed out that in either case the effect would be to require the school district to comply with the building code indirectly when the same effect could not be accomplished directly under the governing statutes. He then ruled that school districts were not required to comply with the municipal ordinance in either case.²⁸

The Regulation of School Building Operation

It is conceivable that a different public policy might be adopted for the operation of schools as distinguished from their construction. The matter of constructing school buildings might appear to be a secondary matter if in fact they were safe healthful places for occupancy while in use.

This does not appear to be the general rule. In general, the courts appear to apply the same rule to inspection that they apply also to construction.²⁹ In connection with the issue, the Iowa court asked "Where has the state put the power involved in the instant action?" In the Cedar Rapids case, the Iowa court declared that the power to enforce both construction and inspection had been reposed in the municipality.

²⁷Niehaus v. State ex rel Board of Education, 111 Ohio St. 47, 144 N.E. 433 (1924).

²⁸Opinions of the Attorney General, Ohio, 1960, p. 436.

²⁹Cedar Rapids Community School District v. City of Cedar Rapids, 252 Iowa 205, 106 N.W. 2d 655 (1960).

The same point of view has been expressed in Missouri. Cities regularly provide special inspections for hot water boilers, passenger elevators, and other specific hazards in buildings. The city of Kansas City subjected school buildings to a boiler inspection (and imposed a fee) against school district objection but was upheld by the courts.³⁰ In Missouri, as in Iowa, the courts have regularly upheld municipal governments and fire protection districts in imposing building codes on school districts as well.³¹ The Kansas City ruling was thus an extension of the same principle.

The exemption of school districts from building inspection under these terms does not, however, extend to all matters. Thus, in New Jersey where school district exemption is clearly established, the courts have ruled that master plumbers contracting a new plumbing work in the construction of school buildings were obliged to submit to an examination and procure a license under a local ordinance protecting the public health.³² After pointing out that the purpose of the code appeared to be to protect the health and safety of the community by requiring that plumbing and electrical work be performed only by people of established competency, the court said,

"It does not appear that the legislature intended an exception in public schools where it is even more necessary that the master plumbers and electricians should be skilled in an ordinary building. The whole intent of the statute is obviously to secure a building which shall be safe for the children, and the legislature did not intend an exception whereby a man might do master plumbing or electrical work and not have a license therefore, merely because the work is in the school building."

Summary

It would appear from this analysis that the intent of public policy is still to repose considerable autonomy in local school officials in deciding

³⁰City of Kansas City v. School District, 356 Mo. 364, 201 S.W. 2d 930 (1957).

³¹Community Fire Protection District v. Board of Education, 315 S.W. 2d 873 (Mo., 1958).

³²Board of Health of Plainfield v. Simkin 10 N.J. Super 301, 76 A. 2d 302 (1950).

promise important advantages.

CHAPTER VII

THE RESTRAINING ACTIVITIES OF SPECIAL AGENCIES

A division of responsibility for the administration of a number of aspects of the school program is made between educational agencies and a variety of other special governmental departments and authorities. These allocations result from two fundamental concepts. First, in the administration of certain crucial activities, it is desirable that there be a uniform public policy enforced in the same way both within school and in the community at large. Second, a number of activities depend for their effectiveness on their administration by personnel who are trained, experienced, and organized to operate at a high level of expertise.

These activities--both those which involve the application of a uniform public policy and the activities of professional workers, are grouped in the present chapter. Some of them apply widely throughout the states and are of long standing. Some of the activities here discussed apply to only a few states. Others are relatively new and little legal exposition has been developed regarding them.

Fire and Safety

Throughout the legal statements which discuss the protection of school pupils from fire and other safety hazards (and health protection as well) there is a continuing theme which holds that the physical well-being of pupils is a matter for first consideration. This is not necessarily an evaluation of the relative importance of education versus the physical well-being of children (although it may be that also). The question is rather one of sequence. Questions of well-being have to be settled first. Only when the minimum requirements for health and security have been met is it possible for education to proceed with reasonable effectiveness.

The protection of physical well-being is one of the obligations of the police power which is residual in the state governments and subject to exercise by the legislature. It has been delegated at the state level to state educational agencies, to state departments of health, or to other departments, and at the local level to school districts, municipalities, or special districts. "The people have a right to the safest method that can be found and determined by the legislature."¹ Thus, in any individual situations, the pertinent question is, "Where is the power?"²

Questions of this sort dramatize the question of who should be entrusted with responsibility for protection against the dangers of fires and similar threats. But they tend to over-simplify the problem. Actually, there are a number of different activities which operate in the protection of safety, and their assignment is not always given to a single agency or official. Among these activities are the following:

1. Safe construction and operation of school buildings.
2. Promulgation of minimum standards for use in the operation of school plants and for the activities of people within the schools.
3. Instruction in fire prevention and protection from physical hazards.
4. Fire, windstorm, bomb and other types of safety drills.
5. Inspection of school premises to locate hazards, and action to remove them.
6. Enforcement procedures by order, court action, building condemnation, or otherwise.

The question of building construction has already been dealt with in Chapters V and VI. Instruction in safety will be discussed with other matters of curriculum.

¹Seattle v. Hinckley, 40 Wash. 468, 82 P. 747, 2 L.R.A. (N.S.) 398 (1905).

²Community Fire Protection District v. Board of Education, 312 S.W. 2d 75 (Mo., 1958).

The question of minimum standards is sometimes dealt with in the statutes--at least in part. Laws in many of the states make specific pronouncements regarding fire escapes, doors opening outward, and similar matters. Where these and similar matters are dealt with by regulation rather than by statute, the state education agency or the state fire protection agency may be assigned responsibility for regulation, or these two agencies may exercise it jointly. Locally, responsibility for inspection and enforcement may be assigned to the action of school officials, local fire departments, or both.

The more common practice appears to be to assign major responsibility to fire protection officials. Fire officers are presumed to have training and experience in dealing with fire hazards. They operate on an independent budget which makes them primarily responsible for the control of fires. School officials may not always recognize the danger or seriousness of safety hazards, and they must also consider priority of demands on the school budget. Where there are community pressures to reduce school expenditures or where there are competing demands for the use of school money, school boards and their administrative officers may not always give the priority to safety considerations which these deserve.

One instance of this kind was reported in which a local school district had permitted its high school building to deteriorate. Under an older pattern of construction, it was the practice for floor joists to be rested in niches in the exterior walls of the building. In this particular building, the walls had tipped outward slightly so that some of the joists on the upper floor of the building had pulled free from the wall. Although school personnel knew that there was a great deal of vibration as classes passed, safety was given a low priority and the vibrations were ignored. Nothing was done about the condition until an inspection was made by the state fire marshal and the building was ordered closed.

Some communities have also found objection to regulation imposed by fire protection personnel. One local fire chief had the power to enforce fire and safety regulations in a local school and to supervise the fire drills. These drills were sometimes conducted when youngsters were in the auditorium, when classes were passing, and on one occasion when students from gym classes were using the showers. A vigorous expression of public irritation followed.

The fire chief was replaced and the authority of his successor was curtailed promptly and substantially.

Where the preparation of minimum standards is concerned, the actual practice is to utilize standard codes to a considerable extent. This appears to be the practice no matter who prepares the regulations. Many of the provisions relating to fire escapes, stairways, explosives and inflammables, and various other matters appear in identical language in the codes promulgated either by fire authorities or by education agencies in the various states.

Codes are more standardized and perhaps their formulation is more complicated than is sometimes recognized. The Fire Prevention Code³ of 1960 which has been adopted for use by various states, cites seven pages of antecedent specialized codes upon which the Fire Prevention Code is based or which extend the subject matter of this code to specialized situations.

The question of whether school districts must comply with the orders of local fire protection agencies is controlled by statute. The authority of the fire departments with regard to schools is usually made clear in the statutory provisions which describe the general authority of the fire departments. Even where the matter is not mentioned specifically, the language is often broad enough to include schools and law suits regarding the matter have been quite infrequent. It has already been pointed out that in the state of Missouri, schools are subject to boiler inspection,⁴ and in a number of other instances school districts in Missouri have been required by court decisions to comply with local fire codes.⁵

Unless fire regulations or the rulings of inspectors are particularly obnoxious, school authorities are likely to regard inspection as a service and

³Fire Prevention Code, New York: National Board of Fire Underwriters, 1960, pp. 174-180.

⁴Kansas City v. School District, 356 Mo. 364, 201 S.W. 2d 930 (1957).

⁵State v. City of Mexico, 255 Mo. 612, 197 S.W. 2d 301 (1946); Wellston Fire Protection District v. State Bank, 282 S.W. 2d 171 (Mo., 1955); Community Fire Protection District v. Board of Education, 315 S.W. 2d 873 (Mo., 1958).

to comply voluntarily with suggestions. Failure to do so might subject school officials to justifiable criticism especially if injuries should result from fire or other hazards concerning which recommendations had been made. Moreover, school independence might be asserted in terms that might make schools ineligible to receive service from the fire department in the event of an actual fire. Since school districts have no residual police power, this could result in an almost complete absence of fire protection. No one prefers this alternative and schools commonly seek cooperation with fire departments.

Responsibility for fire protection is sometimes assigned to special districts or, upon occasion, to a public corporation.⁶ Special purpose districts are often larger in area than are municipalities, so that more effective service can be provided in such matters as fire protection.

Similarly, fire protection may also be delegated to a public corporation of the "authority" type. Limited purpose corporations of this sort are also used in education to provide park, library, television, or other types of services valuable for schools. Fire protection may also be made a responsibility of a "second-layer" of local government similar to the municipality of metropolitan Toronto (Canada),⁷ a few metropolitan areas in the United States, or borough government in Alaska.

In any of these conditions, a question may arise after a special agency has been created as to whether the school district is responsible only for compliance with (1) state regulations (as it will be if the state has occupied the field), (2) municipal codes, (3) special district codes, or (4) some combination of these. The particular statutes would control in any of these cases, and litigation may be necessary to determine the binding power of any of the fire codes. This question was in fact at issue in two of the Missouri cases already cited where the court held that the school district was subject to the code of the fire protection district but not of the municipality.⁸

⁶3 Antieau, Municipal Corporation Law, 515 ff.

⁷3 Antieau, Municipal Corporations Law, 535 ff.

⁸Wellston Fire Protection District v. State Bank, op. cit.;
Community Fire Protection District v. Board of Education, op. cit.

Health Protection

The areas in which the administration of health protection produces intergovernmental problems include the general sanitation of school premises - especially those involving food services - and sewage disposal and disease control.⁹

As a general policy, the various states repose chief responsibility for the administration and enforcement of regulations dealing with health and sanitation upon health authorities. This is an area in which there seems to be a clear recognition of the need for the expert services which might be provided by physicians, sanitary engineers, nurses, and similar personnel. There is less disposition to equivocate about the assignment of this responsibility to professional health personnel rather than to educational agencies.

Yet there is still considerable variation in the patterns of administration. State regulations governing school health are commonly promulgated by the state department of health (sometimes with the cooperation of the state education agency). Statutes commonly make local school officials responsible for maintaining school premises in sanitary condition and for the conduct of school activities with appropriate regard for good health practices. Local health authorities may inspect school premises particularly including matters connected with water supply, sewage disposal, food service, and similar activities where matters of health may be critical. In a very few instances, the observations of local health officials may be purely advisory upon school authorities, but ordinarily some procedures are established for enforcement.

The control of matters of health is subject to regulation by statute, and while the statutes are not always clear as to the legislative intent, the powers to administer health protection are usually given a liberal interpretation in view of the strong public interest in good health.¹⁰ These powers are

⁹Certain other categories of health protection such as physical examinations, first aid, treatment of athletic injuries, etc., are not subject to the same type of administrative controls as are here being considered and are not discussed. While these demand expert services, they are less often matters for non-school control.

¹⁰In re Whitmore, 47 N.Y.S. 2d 143 (1944); Shepard v. City of Seattle, 59 Wash. 363, 109 P. 1067 (1910).

not always defined as precisely as in the state of South Dakota, but the provisions of the South Dakota law may be used to illustrate common (if less well defined) public policy.

(The County Board of Health) shall have reasonable power to inquire into the sanitary conditions of schoolhouses. . . and upon completing an investigation shall have power to abate any unsanitary conditions that may be found to exist, When upon such investigation said county board of health shall find any schoolhouse in such an unsanitary condition that it is detrimental to the health of the children attending school therein, it shall immediately summon the school board of any such district to a hearing thereon and require the school board to abate the condition complained of. The order so made shall be in writing and a copy of each order placed on file in the office of the secretary of such board. Any order so made shall be enforceable in the same manner as are other orders made by such board with the same rights of appeal to the circuit courts.¹¹

The Attorney General of Illinois has ruled officially that schools operating a school lunch program in territory over which the county health department has jurisdiction are subject to the health department's jurisdiction.¹² The question of the supervision of lunchrooms was also at issue in two Missouri cases.¹³ Although the Supreme Court of Missouri has previously ruled that the statutes exempted the St. Louis school system from the supervision of city authorities in school building construction and operation, the court ruled that the language of the Missouri statutes did, nonetheless, appear to vest authority to supervise sanitary conditions in school lunchrooms in the city of St. Louis, and the power to supervise was therefore confirmed.

Control of Disease

The provisions for the control of disease are more specific and forceful than those relating to some other phases of health protection. There

¹¹South Dakota Code, 1939, Sec. 27.1805.

¹²Opinions of the Attorney General, Illinois, 1954, p. 117.

¹³Bredeck v. Board of Education, 213 S.W. 2d 889 (Mo., 1948); Smith v. Board of Education, 359 Mo. 264, 221 S.W. 2d 203 (1949).

is no question of public intent that sufficient power shall be available to whatever authorities are designated in order to insure that adequate provisions for health protection can be taken.

Disease control is recognized as a matter which calls for the professional administration of physicians and other specially qualified personnel. There are few conflicts between educational and health authorities in disease control. One such conflict was litigated in Kentucky where the teacher of a one room school, the members of the school board, and ten residents of the district, protested the role of a local board of health requiring vaccination for smallpox, alleging that school officials (not the board of health) had responsibility for the determination of health policy in schools. In ruling against these plaintiffs, the Kentucky court said,

It is idle for the residents of (the school) district to say that there is no necessity of enforcing the vaccination rule in the schools, or that it is an unreasonable requirement on the part of the health board. They would make their unprofessional opinions jeopardize the health and lives of all the citizens of the county. Matters of such grave importance are not to be decided according to the whims of laymen. It presents a medical question; and for that reason boards of health are usually composed of physicians, experts in that line.¹⁴

Similar rulings in which the decisions of boards of health have been held to prevail over those of school authorities have been made in relation to the vaccination of pupils¹⁵ and with regard to the closing of school during an influenza epidemic.¹⁶ However the power of a board of health to enforce quarantine regulations was held not to embrace authority to close the public schools under the terms of a former Oregon statute.¹⁷

¹⁴Hill v. Bickers, 171 Ky. 703, 188 S.W. 766 (1916).

¹⁵State ex rel. Home v. Beil, 157 Ind. 25, 60 N.E. 672 (1901).

¹⁶School District v. Board of Health, 20 Ariz. 208, 179 P. 55 (1919).

¹⁷Crane v. School District, 95 Ore. 644, 188 P. 712 (1920).

The exercise of the general power to regulate matters of health and sanitation is not confined to methods which have had long usage. As new methods for the control of health appear, or as new problems of health develop from the concentration of people in urban areas or from the occupation of the land, additional measures can be undertaken whenever, in the opinion of the legislatures, these appear to be either necessary or desirable. The general rule was stated recently by the California courts.

. . . . The police power as such is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of police power may now, because of changed living conditions, be recognized as a legitimate exercise of the power.¹⁸

Moreover, these need not always be stated in precise detail. Many of them can be inferred from general powers previously granted and exercised for many years. The general tendency of the courts to interpret statutes according to their apparent intent and to relate various sections of the statutes in order to determine the legislative intent are employed in the analysis of provisions which are appropriate for the exercise of the police power including all aspects of health. Thus, the New Jersey Court said,

The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power. (The Court is not confined to the specific terms of a subsection) but must examine the entire act in the light of its surroundings and objectives. (Nor is the Court) restricted to the ascertainment of standards in express terms if they may reasonably be implied from the entire act.¹⁹

¹⁸Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479 (1925).

¹⁹Ward v. Scott, 11 N.J. 117, 93 A. 2d 385 (1952).

Pupil Transportation

Transportation of pupils by school bus is an activity carried on by at least some of the school districts in all of the states. This activity is regulated and to some extent supervised in all of the states as well. The power to regulate or supervise is frequently assigned to more than one agency, apparently to take advantage of the particular capabilities of each agency as well as to assign the regulatory authority to an agency which might perform the same functions in non-school situations.

Under these terms, the licensing of school bus drivers, the safety inspection of school buses and the operation of buses in traffic on highways are likely to be the responsibilities of the highway police departments, or of local police. State education agencies may be responsible for standards of service such as load capacity of buses, student behavior on buses, distance from school as a factor determining eligibility to ride a school bus, and similar matters.

Approval of bus routes or of contract terms for the employment of contract buses may also be a function of the state education agency or of some fiscal agency of the state if state funds are provided to reimburse local school districts for transportation costs. Matters such as regulations for loading and unloading pupils, and standards for the design, construction, and maintenance of school buses, may be a responsibility of either highway departments or of state education agencies or may be jointly exercised by both.

Many of these matters are regulated by statute in various states. In others they are controlled by departmental regulations.

Both the statutes in question and the standards promulgated by state agencies display a remarkable similarity between states. Actually, they reflect the recommendations of the National Conference on School Transportation which began a series of meetings with a "First Annual Conference" in 1939. The publications of this conference in the form of Minimum Standards for School Buses form the basis for regulation either directly or through the imitation of the standards of one state by another throughout the country.

It is possible that some minor disagreements and irritations may develop among the various agencies operating or regulating school bus transportation. These seldom require adjudication in the appellate courts. Whatever may be the merits of the regulatory systems provided by individual states, the total pattern appears to have had these effects:

1. The utilization of both expert opinion and the findings of research in the formulation of standards governing operation.
2. The assignment of responsibility for certain aspects of regulation to the same agencies which perform the same activities in non-school situations.
3. A high degree of uniformity of regulation in a field where, because of the continuing possibility of accident and injury and because of great mobility of population, uniformity becomes very important and valuable.

Civil Defense and Disaster Relief

There appears to be little question that the public expectation is that school facilities and personnel should be used in the public service for the relief of distress arising from enemy action or natural disaster. If a community suffers crippling damage, school buildings are used as first aid and relief centers and as dormitories. School cafeterias provide emergency food service. School owned motor vehicles and buses are used for transportation.

All of the states have some sort of statutory provisions for dealing with such emergency situations. Many of these appear to be based on a model law, but with significant variations for individual states.

The common provisions establish a hierarchy of local, state, and interstate agencies to deal with the problems of catastrophe. Agencies for relief (commonly referred to as civil defense or disaster relief agencies) are often set up independent of regularly operating government agencies, but usually with some participation both in planning and in actual operation by executive agencies of the government. Participation begins with the governor and extends down to local officials and agencies. The statutory language

usually provides that in the event of disaster conditions, the authority of civil defense agencies will supersede that of other regularly operating agencies of government, and the decisions of civil defense authorities will prevail over the ordinary governmental routines.

Schools are not often mentioned in the statutory provisions and the legal position of schools is often uncertain. Only rarely is there statutory authority for schools to spend money in planning for disaster relief or to accumulate stand-by supplies and equipment for use in disasters. Meantime, the authority of school officials to commit school funds, facilities, or personnel to the public service in individual cases is far from clear.

There appears to be little question as to the power of a board of education to prepare for emergencies and to use school resources in the protection of school pupils. This appears adequately covered by a Washington case in which the court said,

"When a pupil attends a public school, he or she is subject to the rules and discipline of the school and the protective custody of the teacher is substituted for that of the parent.

"As a correlative of this right . . . a duty is imposed by law on the school district to take certain precautions to protect pupils in its custody from dangers reasonably to be anticipated."²⁰

The statutes of many of the states authorize their political subdivisions and civil defense agencies to cooperate with the agencies of other states and with the federal government. This authorization makes it possible to coordinate relief plans and to participate in any federal plans for financial reimbursement. The chief question (and a commonly unanswered one) is whether the terms of these acts apply to school districts.

There is also uncertainty as to the applicability of in-state provisions to school districts. The language used by a number of the states

²⁰Briscoe v. School District, 32 Wash. 2d 353, 201 P. 2d 697 (1949).

(apparently copied from a model act) is similar to the section which appears in the Maine statutes.

In carrying out the provisions of this Civil Defense Chapter the governor and the executive officers or governing bodies or the political subdivisions of the state are directed and shall utilize the services and facilities of existing departments, offices, and agencies of the state and all the political subdivisions thereof to the maximum extent practicable, and the officers and personnel of all such departments, offices, and agencies are directed and shall cooperate with and extend such services and facilities to the governor and the civil defense and public safety organizations of this state upon request.²¹

Perhaps these terms are intended to apply to school districts, but in many of the states the language does not clearly indicate this. In contrast, the statutes of Iowa provide:

County boards of supervisors, city or town councils, and school boards are hereby authorized to cooperate with the administration to carry out the provisions of this (civil defense) act, and may appropriate and spend public funds therefore.²²

Authority for school districts to spend public funds in anticipation of disaster conditions does not usually appear in the statutes. In the absence of such statutory authority, it probably does not exist under the strict budget laws found in many states. There may be some public intent for district funds to be used during disaster conditions, but this is unclear from the language of statutes in most of the states.

A further question arises as to the authority of school districts to comply with the requests of civil defense agencies during emergencies without observing the customary school district budget restrictions, issuing contracts on the basis of bids, and otherwise. This is also unclear in many of the states. In Illinois the matter has been made clear for "political subdivisions" of the state. The Illinois statute reads:

²¹Revised Statutes of Maine, 1954, Sec. 12-13.

²²Iowa Code Annotated, 1949, Sec. 28A-7.

In the event of such a disaster each political subdivision is authorized to exercise the power vested under this section in the light of the exigencies of the disaster and, excepting mandatory constitutional requirements, without regard to the procedures and formalities normally prescribed by law pertaining to the performance of public work, entering into contracts, the impairing of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, and the appropriations, expenditure and disposition of public funds and property.²³

The provisions relating to school participation in civil defense and disaster relief activities in the various states lack the clarity commonly found in other sections of the statutes which have equal importance. It would appear that the public intent is for persons skilled and organized to perform relief measures to assume a superior responsibility for directing the participation by school systems as well as other agencies of government in the prosecution of relief plans.

The Educational Program

Few matters in the educational and instructional program in the public schools are subject to supervisory restraint by non-educational agencies. The administration of curriculum has traditionally been a responsibility of state and local public school authorities, and there is little disposition to change this well-established policy. Nonetheless there are a few exceptions in which non-educational agencies in some of the states do participate in the preparation of instructional materials or in the administration of the regular instructional program of the public schools.

1. Fire protection agencies are occasionally given the responsibility for developing instructional programs in fire prevention and safety. More often this responsibility is given jointly to state agencies of fire protection and to the state education agencies.

²³Illinois Revised Statutes, 1959, Sec. 127-227, Par. 9 (B).

The assignments include:

- 1) The publication of instructional materials--usually in the form of bulletins or brochures.
- 2) Provision for the supervision of fire or other safety drills.

2. In one similar instance, the State Board of Education and the State Game and Fish Commission in Arizona are directed to cooperate in providing a course of study and instructional materials for teaching the safe handling and use of firearms and safe hunting practices. Other provisions of this plan permit cooperation of schools with gun clubs, game protective associations, and other private organizations, define the eligibility of pupils for training, and provide for the certification of instructors. The inclusion of this course in the curriculum is optional with local school districts.

3. Regulations in a very few states provide for the cooperative supervision of apprentice programs by school authorities and local trade unions. State labor departments and industrial commissions may possibly be involved also in the supervision of trade, industrial, or apprentice programs in individual states, although there is little legislation or litigation dealing precisely with this particular subject. The issues, where they arise, are usually between the pupil and his employer, between the pupil and the school, or between the pupil and another governmental supervising agency. They are rarely between the schools and other governmental agencies.

4. There are provisions for the joint operation of classes in disaster relief conducted jointly by the public schools and civil defense authorities. While these may be established locally in response to public request, they are in fact voluntary with school districts. Thus, the local schools need not accept the programs or participate in them unless their content is acceptable in the local situation. Funds are usually available from non-school district sources to support the program. Under these conditions, legislation may be unnecessary and litigation is unlikely.

5. Statutes in a considerable number of states provide for the joint construction and operation of parks, libraries, museums, or similar

facilities jointly with municipalities, counties, or special districts. These operations may take place under a contract by which one agency agrees to provide services for the other, or there may be provision for joint control of the construction and operation of the enterprise. The activities may either be wholly recreational or the program may include important educational activities as well. The agreements under which they are conducted may deal only with financial matters, but they may also be concerned with such additional matters as staff and scope of program.

A number of matters related to these joint projects are commonly defined by statute. These include authorization to engage in the project, provision for their administration, financial responsibility, liability, and provision for the termination of the agreements. Since the projects are usually developed on a voluntary basis, litigation, if any, is likely to be concerned only with property matters and is less likely to involve the question of intergovernmental control.

6. Educational television is another area which is subject to inter-agency control. Whether educational programming is produced on either an open or a closed television circuit, it is almost certain to be supervised by various local state and federal agencies. The state education agency is likely to be one of these. Other agencies may be concerned with mechanical and practical aspects of broadcasting educational programs. Since the telecasting signals may cross state lines in educational television, projects are subject to control by the Federal Communications Commission as well.

Projects in educational television may be financed from a number of different sources including foundation grants, tax funds, public gifts and contributions, and subscriber service. "Bootleg" use of television programs by individual non-subscribing schools is possible, and some regulation of this possibility may later become necessary. This (and any supervision of financial activities) may be carried on by a non-educational agency of government.

Television programs may be used within the service area by public schools, parochial schools, independent private schools, and (on open circuit) possibly by clubs or individuals. Each type of school has interests in the design and scope of the programs offered. Direct official participation by

some of these various groups and schools in a government operated project is difficult and is often regarded as legally impossible under the terms of the First Amendment to the Federal Constitution which guarantees freedom of religion.

For these reasons among others, non-profit corporations have been set up to operate programs in educational television in a number of areas in the country. Examples of this sort include the New Hampshire Educational Broadcasting Council, Inc., the Bay Area Educational Television Association (San Francisco), the Connecticut Educational Television Corporation, and the St. Louis Educational Television Commission. These organizations, and some others like them, make provision for membership and representation on the governing boards of directors from the different types of school systems here listed and often from institutions of higher education as well.

Although some of the enterprises producing educational television are now more than ten years old and have had a reasonable degree of success, experience today is still being analyzed in order to find ways of managing educational television which are satisfactory in all respects. The question of religious freedom as it relates to educational telecasting does not appear to have produced unpleasant controversies, but there are still legal questions under this general subject which must be considered in relation to the use of tax funds and the supervision of programs. Other legal issues are still to be litigated when the proper fact situations arise, and some of these may deal with the intergovernmental control of programs in educational television.

The multiple governmental controls of instructional and other educational processes described here under the title of "The Educational Program" have to date produced very little litigation. The projects jointly controlled by educational and non-educational agencies of government in administration of educational programs are often voluntary. Disagreements between these governmental agencies (or any non-governmental agencies which may be involved) are more likely to result in the abandonment of a project than in attempts to settle arguments by litigation. The various projects do, however, illustrate the public acceptance of plans which make use of expert levels of competency possessed by both educational and non-educational agencies of government and their commitment to the support of the public school program.

School Personnel Administration

Two aspects of local school district personnel administration are notably affected by intergovernmental controls. These are the matters of civil service and of employer-employee labor relations.

Civil Service

Relatively few school systems in the United States must administer school personnel under civil service regulations. Some civil service requirements originate in city charters or in special legislation applying to only a few school districts. The application of civil service rules is usually a matter of individual statute and requires individual interpretation. Thus judicial rulings in one jurisdiction do not always transfer easily to another.

Where the statutes authorize a civil service system, in effect they guarantee certain working conditions for the covered employees. Thus if either classified or certified school personnel are employed under civil service rules, these rules govern the employment, service, tenure, termination, and other significant factors in the relationship of the employee to the school system.

A civil service board commonly represents a second layer of discretion superior to that of a local school board in civil service matters. Where conflicting decisions are reached by school boards and civil service in the administration of personnel, the issues are subject to judicial determination. Appeals are usually made by an aggrieved employee who petitions for adjudication of rights. Thus, the appeal is unlikely to be concerned directly with the jurisdiction of the school agency as distinguished from that of a civil service board.

School board discretion may, by statute, be made subject to legal provisions protecting individuals against discrimination on religious, racial, or national grounds. These provisions may apply within civil service requirements or independent of them. Where anti-discrimination statutes are

administered by a board of commission, the rules of this agency may be binding on educational boards.²⁴

Labor Relations

About a dozen states have labor statutes applying directly to school employees or to public employees under terms which include employees of school districts. A number of suits have originated and been carried to the appellate courts on questions involving school district-employee relationships. In most of these cases, the question of the relationship between local school officials and labor relations boards was not an issue. Litigation more typically involves workers and employers. Labor boards may be involved if the scope of their authority is challenged.

There are at least four basic questions involved in the analysis of possible relationships between school districts and labor boards where disputes between a school district and its employees are concerned.

1. What is the authority of the labor board in the dispute?
2. To what employers or employees does the jurisdiction of the labor board extend?
3. To what questions does the jurisdiction extend?
4. What action may the labor board take in relation to a school district and its officers?

In industrial relations, the jurisdiction of a labor board may originate either in a statute or under the terms of a labor contract. If a labor contract is authorized between a school district and its employees and if such a contract actually exists, its terms help define the authority of the labor board. However, such contractual agreements are very uncommon.

The Michigan statutes, however, contain a provision which details the authority of the labor boards (in Michigan called the Labor Mediation

²⁴Application of Lombardo, 240 N.Y.S. 2d 119 (1963).

Board) in relation to teachers and other public employees. This provision reads:

"Upon the request of a majority of any given group of public employees, evidenced by a petition signed by said majority delivered into the Labor Mediation Board, or upon the request of any public official in charge of such employees, it shall be the duty of the Labor Mediation Board to forthwith mediate the grievances set forth in said petition or notice. . . ."25

The language of this Michigan statute would appear broad enough to cover teachers, custodians and all other school employees. Not all statutes are equally clear. The issue as to who may be covered by such statutes was raised in a Minnesota case under a statute (since amended) which forbade strikes by "officials charged with duties relating to public safety." This language was held not to apply to janitors and janitor engineers.²⁶

Another issue involves the extent of the jurisdiction of the labor relations board to particular questions. This issue has been raised in two suits involving a definition of the word "grievances" as used in labor disputes involving public employees. This word is usually used in labor relations to refer to alleged abuses or violations of provisions of a labor contract. But there was no labor contract in either of these cases. In both cases, the courts held that the term "grievance" when used in relation to the special situation of governmental employees whose service is not covered by union contracts, refers to the main elements of employee relationships--wages, hours and working conditions.²⁷ Hence labor disputes between governmental agencies

²⁵Michigan Annotated Statutes, Sec. 17.445 (7).

²⁶Board of Education v. Public School Employees Union 233 Minn. 144, 45 N.W. 2d, 797, 29 A.L.R. 2d 424 (1951). The revised statute dealing with this question in Minnesota now reads, "No person holding a position of appointment or employment in the government of the state of Minnesota. . . or in the services of the public schools. . . or hereafter called a public employee shall strike or participate in a strike. . . ." Minnesota Statutes, 1957, Sec. 179.51.

²⁷School District of the City of Garden City v. Labor Mediation Board, 353 Mich. 258, 99 N.W. 2d 385 (1959); Pittsburgh City Fire Fighters Local v. Barr, 408 Penn. 325, 184 A 2d 588 (1963).

and their employees involving any of these matters were within the jurisdiction of the labor boards.

A remaining question deals with the action which a labor relations board may take in handling a labor dispute between a school district and its employees. Labor relations officials are variously authorized to engage in mediation, conciliation, fact finding, arbitration, and other activities in labor disputes. Each of these terms has a technical meaning. The Michigan statute cited above refers to the "mediation" action of the labor relations board in that state. Mediation is ordinarily an advisory negotiating activity, not binding on either party to a labor dispute, and it is such in Michigan. School districts and their employees are subject to this action by labor boards in that state.

Another related statute in Michigan provides for a fact-finding procedure by the Labor Mediation Board whenever a governmental agency, by resolution, has voted to adopt the fact-finding procedures. The purpose of fact-finding is indicated in the statute.

Whenever in the course of mediation, . . . it shall become apparent to the (Labor Mediation Board) that matters in disagreement between the parties might be more readily settled if the facts involved in the disagreement were determined and publicly known, the board may make written findings with respect to the matters in disagreement. Such findings shall not be binding upon the parties but shall be made public. . .²⁸

The attorney general of Michigan has ruled that this language is mandatory--that is, fact-finding cannot be carried on by the Michigan Labor Mediation Board unless a municipality (presumably including school districts) has passed the resolution referred to.²⁹

In summary of this discussion, it would appear that any authority which labor relations officials might have to supersede the action of a school

²⁸Michigan Annotated Statutes, Sec. 17.454 (27).

²⁹Opinions of the Attorney General, Michigan, 1957, p. 285.

board in dealing with labor disputes between school districts and their employees must appear by statute. The language of such statutes is usually technical in nature and is rigorously defined and applied by the courts. There is an evident public attitude which holds that labor disputes in schools have a very important relationship to the public interest. In the instances cited, the legislatures appear to have determined that the resolution of such disputes may best be handled if the services of trained, experienced, skillful administrators of labor relations are assigned the responsibility of dealing with labor disputes in schools. Courts have upheld the clear intent of statutes on this regard.

Summary

The operation of schools is not always a discrete, isolated activity within contemporary society. Many of the activities which take place in the course of conducting an educational program touch other activities in society which involve the comfort, safety, and convenience of everyone. As living patterns become more complex, more of these matters are entrusted to the ministrations of specialists in society at large. The scope of the responsibilities of specialists tends to expand and include schools. Teachers, administrators, and many of the non-certified employees of school systems are specialists too, but the prevailing intent appears to be to employ any specialist only within the area of his specialty. Thus there appears to be a recognizable effort to coordinate the activities of educators with those of firemen, health personnel, and others, and to use the services of all of them in operating the public schools.

CHAPTER VIII

THE IMPLICATIONS OF INTERGOVERNMENTAL CONTROL OF EDUCATION

The present study represents an exploration of the legal structure within which the administration of American public education is provided. This structure was designed for operating schools in an agriculture - dominated society, and among an essentially rural people. As the population grows and becomes increasingly concentrated in metropolitan centers, the values previously derived from government of schools by individual small districts tends to diminish and the patterns of government begin to show signs of stress.

As these evidences of stress multiply, changes are introduced into the legal statements which establish norms for school operations. Modification of governmental structure are also sought which will more adequately serve the means of providing education under changed social conditions.

The present study has sought to identify some of the characteristics of the governmental structures presently existing. Responsibility for operating schools is to some extent divided between educational agencies and other non-educational agencies of government. Stress sometimes arises where these individual responsibilities interact with each other in the operation of schools. The interacting agencies are found at both the state and local levels, but the activities of all of them converge upon the actual operation of school in local communities. The present study is concerned with the legal and political working relationships between these educational agencies and the various non-educational agencies of government which perform responsibilities in relation to schools.

In a sense, this is a descriptive study. Some casual attention is given to historical matters in order to describe the particulars in the present situation. But there is no primary intent to describe how the present system

evolved. Similarly, there is no pretense of projecting the present school system into future social, economical, and political conditions.

Much of the importance of the present study derives from the fact that various facets of American culture and of American social organization are undergoing rather significant changes in accompaniment with rapid change in scientific and economic matters, a great growth in population, and sweeping changes generally in both American and world culture. As these changes manifest themselves in American society, a continuing challenge arises. What ought to be the character of American public education, and what should be the nature of the governmental structure provided to operate the American school system?

Answers to these questions are not immediately evident. The nature of the emerging society--of its salient features and of its governmental problems can only be anticipated--not reliably predicted. But it may be expected that any changes will be modifications of present cultural and governmental patterns. Thus an understanding of the character of the present governmental structure for providing education has an immediate value.

Various analyses of the organizational structure of American public education have been made previously. Some of them overlap the present study somewhat. The question of the fiscal relationships between educational and municipal units of government, for example, has been studied by various researchers. The interest of the present study is to review these same relationships together with those affecting other phases of school operation such as the construction and operation of school buildings, the provisions of services to pupils, and even (to some limited extent) the management of the curriculum, so far as all of these are matters of joint concern for educational and other government agencies at state and local levels.

The present chapter is divided into three sections. The first section presents a series of observations and understandings which are essential to an effective analysis of the legal relationships between the various agencies that exert control over public education. The second section presents summarizations of the substantive findings of the study. The third section reports summarizations and implications drawn from the analysis of the earlier data.

Legal Provisions for Educational Government

1. Education in the United States is primarily a responsibility of government. Education is also provided in this country by churches, individual families and various private enterprises, and important numbers of pupils are educated through their efforts. But the provision of universal, compulsory, free education is conceived to be a proper function of government, and public policy has lodged the principal responsibility for education in governmental agencies.

2. The structure for the government of the American public school system is legally defined. The definition is to be found in the language of statutes, court decisions, departmental regulations, and other public documents. It is not possible either to understand or certainly to analyze the provisions by which schools are actually operated through reference only to observations, official reports, statements of officials or other similar data exclusively. The basic legal formulations must also be examined.

The commonly held public understandings by which government is operated, the approved standards of behavior both in government and out, the existence of individual personalities of some power and the nature of their attitudes toward existing legal statements, and various other similar forces may influence the actual operation of schools in derogation of legal provisions. These legal statements are expected to describe behavioral norms in relation to the particular subject matter. They do not always do so with precision. But where statements are clearly drawn, they usually represent the point about which the cluster of variations in practice is likely to be found.

3. Education is properly understood to be a responsibility of the state governments in this country, and the power to govern education is lodged in the legislatures of the respective states. Yet, even at the state level, responsibility for administering education is not lodged exclusively with educational offices or agencies. State education offices may be given important powers to provide regulations, to require reports, or to prescribe forms for the use of local school districts. But in other cases, these powers may be shared by the education agency with other departments of state government. In some instances, the non-educational agencies may have primary responsibility

for supervising, restraining, or controlling some of the many activities of school, exclusive of any control by the state education agency.

Major responsibility for most aspects of actual operation, is, in fact, delegated to local school districts. But at the local level also, some specific activities may be directly assigned to other governmental agencies, or these agencies may be given power to review or restrain the action of school district officials.

4. Local school districts, through their respective officers and employees perform the major role in the operation of school. However, the delegations of power to administer schools are not uniform for all school districts, even in the same state. The forces of "localism" exert a vigorous impact upon the design of governments of all types in this country. The effect of these forces can be seen in the variety of structures provided for the administration of schools in various states. Local agencies established for this purpose include at least:

1. School districts uniform in character throughout an individual state.
2. Schools operated by municipal governments under home-rule charters.
3. Home-rule school districts operated under their own charters.
4. School districts established by general law, but operating under the provisions of local or special legislation.
5. School districts classified into categories on some basis of local significance (usually population or governmental relationship to a particular class of city or town.)
6. Special purpose school districts such as vocational or junior college districts.

The present study is concerned with identifiable state policy. Schools operated under charter, for example, by their definition represent exceptions to state policy. A state may classify objects within its jurisdiction as it has done with schools and make special provisions applicable to each of them.

But when a state grants a home-rule charter, it in effect delegates the choice of means for administering schools to the local government, subject to the fulfillment of specified requirements as to the extent and quality of the local educational programs. Thus, provisions identifiable in the statutes may not apply equally to chartered districts or to others which exist under special acts.

5. There is diversity also among non-educational government agencies which, in individual instances, is related to school operation. It is well known that cities and counties may be classified into first, second, third, fourth, or other classes on the basis of criteria established by a legislature. Power to perform certain duties in relation to schools may be lodged with local governments of a certain class in the same way that they may, under other provisions, be lodged with school districts of a particular class.

The functions of local government may also be lodged with special governmental districts or agencies as well as with cities, towns, counties, or other units. Even in areas governed for the most part by local municipal governments, some functions such as fire protection, health and sanitation, or recreational service may be the responsibility of special governmental units. The territorial jurisdiction of these units may extend over a number of villages, cities, towns, or parts of any of them and over rural territory as well. Some of these special districts may contain parts of more than one municipality or of more than one school district within their area of jurisdiction. Similarly, a single school district may include territory which is subject to regulation by two or more fire protection area organizations or other kinds of special purpose districts.

The Operation of Intergovernmental Controls

It is possible to analyze the intergovernmental control of public education in a variety of different ways. A brief summary of the operation of these controls must, by reason of its brevity, omit consideration of some of the effects of the variations which have just been discussed. In addition, there are certain qualifications which ought to be understood in considering the application of intergovernmental controls to the operation of schools in individual communities.

1. School districts may have apparent autonomy in the determination of school policy and the operation of schools. This apparent autonomy may be very real, although this is comparatively uncommon. Again, the district and its officers may be free of overt control, but subject to indirect control through other related procedures. For example, a district may locate and build a school building without interference, but later be subject to control through inspection procedures.
2. Nominal control may be authorized by statute, but the actual authority of supervising or restraining agencies may be purely ministerial. Authority may be given only to enforce statutory provisions or similar requirements.
3. Direct controls may be present, but they may be applied with less than complete vigor. This may happen where legal pronouncements are obsolete and have actually been superseded by different procedures, where enforcing officials have less enthusiasm for the policies they administer, or where competing traditions, customs, or public understandings equalize legal stipulations to a considerable degree.

The Control of Fiscal Activities

The actions of school officials in financial matters are subject to control in two ways. First, indirectly through the control of financial accounting. Second, directly through the control of budgets and capital expenditures.

Two fundamental questions of law must be answered with respect to public school expenditures. First, is the proposed expenditure for a public as distinguished from a private purpose? Second, has the expenditure been authorized by law? The last question might be interpreted to mean, Has an appropriation been made? Actually, this question does include the subordinate one. It also includes a question as to whether an expenditure has been authorized for this particular claim by an item of appropriation in the budget.

Matters such as these lie within the discretion of some public official. In fiscally autonomous districts, decisions may be made by the board of education. In non-autonomous districts, school board action may,

however, be restrained by a second order of officials in non-educational agencies. These officials may exercise considerable restraint over the actions of school districts in a number of ways.

1. Through the design of the accounting system and the promulgation of the governing regulations including the coding system. This becomes an increasingly more powerful control device as the itemization of financial account required by the statutes increases.
2. Where an official serves as treasurer of the school district ex-officio (and where the treasurer has not been defined as a purely ministerial officer) he may exercise discretion in the pre-audit of school district claims.
3. Ex-officio post-auditors must, under usual auditing procedures, pass on the legitimacy of claims which have been paid. Thus, these officials are able to influence school district expenditures.
4. An ex-officio attorney may also have an opportunity to rule on the legality of school board expenditures, especially if he is also the attorney for the school district treasurer or for other agencies which have some supervisory relationships to the school district.

School district budgets, short-term loans, and bond issues may be authorized by school districts without restraint except any imposed by statutes. Probably the majority of the school districts of this country do have nominal budget autonomy. Other districts may be subject to a second budget approval after a budgetary estimate has been prepared and proposed by the superintendent or school board and has been adopted by the school board for the school district. These local approval agencies include regular county or municipal governments or special commissions established by law for the review of school district budgets. School budgets may also require approval by the state educational agency or by some fiscal or other state agencies. Multiple approval by two or more agencies is not uncommon.

Tax levies are, for the most part, levied as a ministerial act by tax levying authorities once the budget has been approved. In certain instances, however, tax levies (or increased tax levies) may require the approval of certain officials. Under the provisions of a number of states, certain

local tax levies may be authorized only by referendum, or referendum may be required if the levy exceeds a certain statutory level.

Short term loans are usually issued on the basis of discretionary action by the school board. The assumption seems to be that since the proposed expenditures for a school district have been described and limited by the budget document which has been approved, and since the revenues needed have been provided for, the discretion of school boards in making temporary loans can be trusted within these limits.

Statutory limitations on the power to incur temporary obligations are very common. But there are relatively few instances in which local school boards are required to obtain the approval of some other agency in order to execute temporary loans. Approval is required from the state education agency in a few states, or, in some other states, from the same local agency which is also required to approve school district budgets. Lease-purchase contracts, where they are drawn for a number of years, require approval by state education agencies in Michigan and Mississippi.

Local school district needs for long term capital funds are usually met by the issuance of general obligation bonds. These may be issued by school districts (1) through the action of the school board alone, (2) through a school district referendum, or (3) by action of the school board with subsequent approval by some other governmental agencies. The power of the school boards to issue general obligation bonds is subject to tight statutory control. Usually such bonds can be issued only under a reasonably low debt ceiling and with further restrictions on the use of the bond proceeds, term of bonds, interest rates, and similar matters.

A relatively small percentage of school district bonds is issued by the independent action of school boards. The more commonly used method of issuing general obligation bonds is through initial resolution by the school board followed by a local school district referendum on the question. There are also provisions for the issuance of bonds after initial action by the school board which is followed by approval of some other governmental agency. Usually the agency in question is the same one that has supervisory power over

the development of the school budget and other financial transactions of local school districts.

Long-term tax anticipation warrants are used to finance capital investments in the state of Alabama. The tax in question must be approved by a popular referendum in the local district, but the warrants may then be issued by the school board with the approval of the state education agency.

School building construction (which is the major purpose for the issuance of all long term obligations) may also be financed under lease-rental agreements (with school building holding corporations) in a number of other states. This device represents a departure from the ordinary pattern of financing capital expenditures in those states where the plan is used. Lease-rental contracts commonly represent school district obligations in excess of debt ceilings permitted for the issuance of general obligations bonds. For this reason, intergovernmental approval is commonly required.

Revenue bonds and loans from state agencies are also used to finance capital items in certain cases. Interagency approval may or may not be required as individual statutes provide.

The Management of the School Plant

The construction and operation of school plants is a second area in which either state or local non-educational agencies may impose important restraints upon local school district action. These may be exercised through the imposition of zoning code regulations, through the use of building codes, through requirements for the approval of school building plans and specifications, or through such devices as building permits and inspection of school plants.

In general, it may be said that the state itself is immune from regulation by local authorities in the construction and operation of state buildings unless the legislature, by statute, has provided otherwise. School districts are agencies of the state. The principal legal question is whether they, as agencies of the state, are likewise immune from local regulations,

or whether they, as quasi corporations and local agencies of government, are subject to municipal control.

There are three general points of view found in the regulation of these matters where school districts are concerned.

First, local school districts may be completely independent of any supervisory agency. This situation may more likely be found in rural areas where no municipality or special district has statutory authority to impose limitations on school district plants.

Second, the local school district may be held to be totally within the control of municipal authorities so far as zoning, building codes, and similar matters are concerned. This is not a common policy among the states, but it is found in a few of them. The same practical effect is found in a few others where municipal or other local governments are required by statute to construct school plants for the use of the local school districts.

Third, state school building regulations may be created to govern the construction and operation of local school plants. The common ruling in such cases is that the state "occupied the field" of police regulation of school building construction when the state regulations were issued. Hence, the local school district which must comply with these regulations is immune from similar regulations or supervision by municipal authorities.

The more common pattern of regulation (and there are many different patterns) would seem to be that of state regulation of construction. This recognizes the growing importance of health and safety factors in school building construction in urban areas and the variation of regulations among local governments.

In one recent situation, for example, it was found that a newly consolidated school district was in fact subject to the building codes of five different local governments in one section or another of the local school district territory.

In this case, it was held that the school district was subject only to state regulation and thus was not required to comply with building codes. The problems faced in this situation are typical of those met by many local school districts as a result of consolidation or as a result of the growth of municipalities across civil boundaries previously established.

Regulation by Specialized Agencies

In a number of other areas of school operation some public advantage appears to lie in a uniform treatment of problems both in school and throughout the community at large. The protection of health and safety, the regulation of labor relations, the administration of civil defense and similar matters are most amenable to action under policies applicable throughout an entire community. Effective control of some of these problems depends, to a considerable degree, upon the activities of persons especially skilled and agencies especially organized to provide the necessary services. Responsibility for these matters in relation to schools is commonly assigned entirely or at least in part to specialized officials and agencies.

Thus the public interest in problems of lunchroom sanitation, disease control, sewage disposal, and similar matters is as important in schools as in industrial establishments or in business enterprises providing services for public accommodation. The assumption is that power to control such matters is lodged somewhere. The basic question is where has the power been assigned where schools are concerned.

There appears to be no question but that some important powers in this general area are assigned to local school authorities. In a few instances, these educational agencies may be independent of any other local control. More typically, major responsibility for protection in these matters is assigned to municipalities or counties to be exercised by their health or fire protection departments, or to special health or fire protection districts, and these share responsibility with school authorities for matters of health and safety.

Action of these latter agencies may prevail over the decisions of school authorities in matters which deal with sanitation, disease control, and

building safety. Where health or other agencies provide service to the public schools (such as school nursing service) the administration of this service is basically in the hands of the health agency; schools are likely to have no discretion in the employment of personnel or the administration of the service in question.

Certain other aspects of school operation also involve competing or overlapping responsibilities between educational agencies and other departments of government specially organized and staffed with personnel having special abilities to perform needed services. Pupil transportation, park and recreational services, civil defense, educational television, and even some limited aspects of the school curriculum may be jointly administered by educational and non-educational agencies of government. In some instances, the activities of educational agencies may be subject to supervision and/or restraint by civil agencies.

The major issues of the control of school activities in these areas, while sometimes peculiar to the activity in question or to the agency which supervises it, are similar in nature to those which have already been discussed. Several specific devices are used to provide administration and supervision for such activities as these in the school program.

1. Assignment of responsibility for an educational service to a non-educational agency. An example is the preparation of curriculum materials and fire protection and safety by a fire protection agency.
2. Provision that under certain circumstances, the discretion of a non-educational agency shall supercede and replace that of educational authorities. Civil defense provides an example. Some provision for the adjudication of labor disputes also provide an example of this kind.
3. Joint operation is provided between the school agency and other governmental agencies, or a service may be provided through intergovernmental contracts.
4. A public corporation may be established with school and other civil government participation to provide a particular service.

In any of these instances, the objectives appear to be (1) to provide expert and organized service in areas where schools do not ordinarily operate, and (2) to make the services of specially trained experts in society available for the service of the total school program.

Concluding Observations

One of the basic functions of organized society is to establish norms for human behavior. These norms appear in many different forms. They can be observed in operation as folkways, traditions, and customs. They may be regarded intellectually as widely held understandings of the proper nature of things.

Written laws are among these established behavior norms. They represent a codification of the experiences and speculations of a given society. Where they apply to schools, they provide an index to the decisions as to how schools should be conducted. Their purpose is to inform everyone of the expectations of society, to guide private and official conduct, and to establish continuity of social policy.

Laws never entirely replace the mores of a society. Yet while they cannot be expected to describe the actual patterns of behavior precisely, they represent an essential point for beginning the study of social phenomena such as the structural organization of the American public school system.

Intergovernmental Control

The functions of government are sometimes performed through the activities of two or more agencies. Some of the activities of schools are carried out through such joint activities. The relationships between local school districts (the typical school-operating units) and other state and local governmental units are much more complex than they have sometimes been described. This is partly the result of the diversity of kinds and categories of governmental units. It is partly the result of overlaps in function and territorial jurisdiction among them.

Although school districts exist as theoretically separate units of government for the purpose of providing education, their "independence" of the actions of other non-educational units of government is much less than is sometimes assumed. On the other hand, the weight of restraint imposed upon school operation by non-educational governmental agencies is, in practice, limited by the balancing effects of court decisions and related legislation. The practical effects of restraints may be less in individual instances than might superficially appear from a reading of legal statements or from the unqualified replies of officials as to their existence and character.

Intergovernmental controls are created basically to serve particular social advantages. Upon occasion they produce very positive values. Upon other occasions they may produce nuisance or handicapping effects. The greatest benefits follow an adequate coordination of the efforts of all agencies involved in providing educational service.

Conditions for Operating Schools

The essential consideration is that provisions for school government should be designed to produce educational services appropriate for a particular set of circumstances. The initial purpose of the present study has been to identify and analyze the intergovernmental provisions through which some activities of the educational enterprise are conducted. Understanding commonly promotes effectiveness in social regulation.

Provisions for the intergovernmental control of public education may have had variable effectiveness under differing social conditions. Certainly the social environment within which schools must be operated changes continuously. Currently change is taking place quite rapidly. When the social milieu changes significantly, some modifications in the provisions for the control and administration of the educational system may yield important advantages.

Recent growth in the population of this country creates additional needs for social norms. Greater controls are needed when people live close together. The growth of cities, the movement to the suburbs, and the restless migration of people from one community to another all produce new norm problems.

So, in the organization of governmental structure to provide education, do the expansion of metropolitan areas across previous governmental boundaries.

New economic problems arise out of changes in wealth-producing activities in society. These are related to the pressure of needs for additional funds to provide schools. New developments in health service, transportation, communication, and other aspects of scientific progress produce differing and often additional governmental obligations.

Major changes in school programs parallel these social changes. The services expected from the public schools today are materially different from those almost exclusively concerned with classroom instruction a generation or two ago. Bus transportation, food service, pupil guidance and educational television have been developing for some time, but all of them have been brought to their present levels within the present century.

An instructional program is provided for a broader range of students and its content becomes more expensive. The high costs of the traditional patterns of vocational education and of such newer offerings as driver training are well-known. Similarly, when schools are asked to serve the man power needs of society by producing more scientists and mathematicians or by retraining displaced industrial workers, the resulting programs are likewise more expensive than the traditional programs in academic areas.

Governmental Structure for Schools

All of these changing conditions exert pressures for the modification of the structure and practice through which to provide adequate government of schools. This is the second matter for which the present study provides some needed background--consideration of an effective governmental structure through which to provide schools.

The expositions which discuss the intergovernmental control of public schools also illustrate the continuing divisions between the forces of localism and those of centralism in American political theory as these are applied to the government of the public schools. In a sense, the growing body of legislative enactments represents a growth in centralism. School

district consolidation has centralizing effects. The transfer of decision on school policy from local to more centralized and specialized agencies and the requirement that state agencies review local decisions represent centralist trends.

There is a long history of compromise and accommodation between localist and centralist ideas in the formulation of public policy. So far as there is any change in the overall patterns of government, it appears to tend toward the centralist position. Some problems are more amenable to action on a large-territory and large population basis. Large units tend to spread and equalize costs and to provide more uniform service. Additional resources in personnel and material (as well as finance) are often available to large units.

There are occasional changes in the direction of localism. Individual communities still obtain charter privileges for operating schools or special favors through permissive legislation. But these devices appear to be used largely when an individual community seeks to escape the force of general policy.

More typically, changes emphasize centralism. Uniform state laws, contracts between local units under which one provides service for another, "two-level" organization of local governments, unification of local governments and the use of the public authority and the non-profit corporation are examples of devices currently in use to provide educational service under changing social conditions. The growth of the regulation of school by state agencies and the occasional state operation of some educational activities also represent centralist trends.

While the evidence is less certain, it appears that there may tend to be more rather than less intergovernmental control of education. The questions about it appear as school district-municipal divisions less often than they once did. Rather they involve school districts and a long list of agencies. Individual school districts may enjoy autonomy in the operation of their school programs for years at a time, but few districts are free of potential control at all times. Dependence (in the sense of budgetary control) appears to be less important than it may once have been. But the growth of population and the complications of modern social conditions provide additional

pressures in favor of the multiple control of important aspects of school operation.

All of these matters relate to the basic questions posed by the present investigation. They relate to the questions of allocating or reallocating the power to control the various activities that take place in school operation. The findings of the study relate to the consideration of devices to standardize the operating relationships between the various agencies that have something to do with schools. The findings are also relevant to consideration of the reorganization of present units of school government or the invention of new units to provide new patterns of educational service.

All of the answers are not to be found in the record today. The development of new patterns in educational practice and the design of appropriate governmental structures to administer them is a continuing responsibility in a dynamic society.

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